FILE COPY

FILED

FEB 22 1974

MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-754

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al., *Appellants*

vs.

BOOKER T. HILLERY, JR., et al., Appellees

No. 73-918

EVE PELL, BETTY SEGAL, and PAUL JACOBS, *Appellants*

vs.

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al., Appellees

On Appeal from the United States District Court for the Northern District of California

No. 73-754 filed November 9, 1973, jurisdiction noted January 7, 1974

No. 73-918 filed December 13, 1973, jurisdiction noted January 21, 1974

PEERLESS-WALKER PRINTING CO. - 545 JACKSON STREET - SAN FRANCISCO, CA. 94133

APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-754

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al., *Appellants*

vs.

BOOKER T. HILLERY, JR., et al., Appellees

No. 73-918

EVE PELL, BETTY SEGAL, and PAUL JACOBS, *Appellants*

vs.

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al., *Appellees*

On Appeal from the United States District Court for the Northern District of California

Subject Index

	Page
Chronological List of Relevant Docket Entries	1
Plaintiff Hillery's Original Complaint for Injunctive Relief and Damages, Filed Nov. 8, 1971	5
Defendants' Return to Order to Show Cause and Opposition to Issuance of Preliminary Injunction or Other Equitable Relief, Filed Jan. 13, 1972	11
Plaintiffs' First Amended Complaint for Damages and Other Relief, Filed Mar. 8, 1972	22
Affidavit of Defendant James W. L. Park, Filed Mar. 10, 1972	42
Defendants' Notice of Motion and Motion to Dismiss; Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, Filed Apr. 6, 1972	43
Defendant Nelson's Answers to Interrogatories, Filed Apr. 10, 1972	53
Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction and in Support of Motion to Dismiss Complaint, Filed Apr. 27, 1972	73
Defendants' Response to Plaintiffs' Supplemental Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Preliminary Injunction, Filed May 2, 1972	81
Defendants' Notice of Motion and Motion to Vacate Judgment and Order; Request for Order Shortening Time; Request for Stay of Injunction Pending Hearing, Filed Oct. 4, 1972	84
Plaintiffs' Motion for an Order to Show Cause Why Defendants Should not be Held in Contempt, Filed Nov. 13, 1972	90
Affidavit of Richard M. Doctoroff in Further Support of Motion for an Order to Show Cause why Defendants Should not be Held in Contempt, Filed Nov. 15, 1972	107
Defendants' Motion to Dissolve Temporary Restraining Order, Filed Nov. 21, 1972	109

Page

Affidavit of Defendant R. K. Procunier, Filed Nov. 22, 1972 122

Plaintiffs' Memorandum and Exhibits in Response to Affidavit of Defendant Procunier Clarifying Administrative Bulletin No. 72/40, Filed Jan. 30, 1973 132

Defendants' Supplemental Memorandum, Filed Feb. 7, 1973 196

Reporter's Transcript, Volume 2, Pages 76 through 155, Feb. 14, 1973 203

Response of Defendants to Memorandum of American Civil Liberties Union Foundation, Filed Feb. 23, 1973 272

Order of United States Supreme Court, Filed Jan. 7, 1974.. 305

Order of United States Supreme Court, Filed Jan. 21, 1974 305

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 8, 1971—Plaintiff Hillery's original complaint for injunctive relief and damages filed in U.S. District Court for Northern District of California.

Jan. 13, 1972—Defendants' return to order to show cause and points and authorities in opposition to issuance of preliminary injunction filed.

Jan. 27, 1972—Order appointing counsel, Richard M. Doctoroff, filed.

Mar. 2, 1972—Plaintiffs' interrogatories to defendant Louis S. Nelson filed.

Mar. 8, 1972—Plaintiffs' first amended complaint for damages, and declaratory and injunctive relief filed.

Mar. 10, 1972—Affidavit of defendant Park filed.

Mar. 11, 1972—Plaintiffs' memorandum in support of motion for preliminary injunction, filed.

Apr. 6, 1972—Defendants' notice of motion and motion to dismiss, and points and authorities in opposition to motion for preliminary injunction filed.

Apr. 10, 1972—Defendant Nelson's answers to interrogatories, filed.

Apr. 17, 1972—Order filed submitting plaintiffs' motion for preliminary injunction.

Apr. 27, 1972—Defendants' supplemental memorandum of points and authorities in opposition to motion for preliminary injunction and in support of motion to dismiss complaint filed.

Apr. 27, 1972—Supplemental memorandum of points and authorities in opposition to defendants' motion to dismiss and in support of plaintiffs' motion for prelimnary injunction, filed.

May 2, 1972—Defendants' response to plaintiffs' supplemental memorandum of points and authorities in opposition to defendants' motion to dismiss and in support of plaintiffs' motion for preliminary injunction filed.

May 19, 1972—Plaintiffs' response to defendants' supplemental memorandum of points and authorities in opposition to motion for preliminary injunction and in support of motion to dismiss, and to defendants' response of May 2, 1972, filed.

Sept. 29, 1972—Memorandum of opinion and order granting motion for permanent injunction, filed.

Oct. 5, 1972—Judgment entered in favor of plaintiffs and against defendants under the terms provided in the memorandum of opinion and order granting motion for permanent injunction filed September 28, 1972.

Oct. 4, 1972—Defendants' notice of motion and motion to vacate judgment and order; request for order shortening time; and request for stay of injunction pending hearing filed.

Oct. 4, 1972—Order filed shortening time on defendants' motion to October 11, 1972.

Oct. 11, 1972—Plaintiffs' memorandum of points and authorities in opposition to defendants' motion to vacate judgment and order, filed.

Nov. 1, 1972—Notification and certificate regarding convening of three-judge court filed.

Nov. 1, 1972—Order filed vacating permanent injunction and granting plaintiffs' motion for temporary restraining order.

Nov. 13, 1972—Order of Circuit Court of Appeals appointing three-judge court filed.

Nov. 13, 1972—Motion for an order to show cause why defendants should not be held in contempt, filed.

Nov. 15, 1972—Affidavit of Richard M. Doctoroff in further support of motion for an order to show cause why defendants should not be held in contempt, filed.

Nov. 21, 1972—Defendants' motion to dissolve temporary restraining order filed.

Nov. 22, 1972—Affidavit of defendant Procunier filed.

Dec. 18, 1972—Memorandum of points and authorities in opposition to defendants' motion to dissolve temporary restraining order filed.

Jan. 30, 1973—Memorandum and exhibits in response to the affidavit of defendant Raymond K. Procunier clarifying Administrative Bulletin No. 72/40, filed.

Feb. 7, 1973—Defendants' supplemental memorandum filed.

Feb. 8, 1973—Order filed submitting defendants' motion to dissolve temporary restraining order.

Feb. 8, 1973—Motion for leave to file memorandum of points and authorities, amici curiae, on behalf of

six members of the press and in support of the contentions of plaintiffs, filed.

Feb. 14, 1973—After hearing by three-judge court, orders filed granting motion for leave to file memorandum, amicus curiae, and allowing defendants ten days to respond, and taking under submission the defendants' motion to dismiss complaint and defendants' motion to dissolve temporary restraining order.

Feb. 23, 1973—Defendants' response to memorandum of amicus curiae filed.

Aug. 16, 1973—Opinion, declaring, *inter alia,* that section 415.017 is unconstitutional, and enjoining its enforcement filed.

Sept. 13, 1973—Defendants' notice of appeal to the United States Supreme Court filed.

Oct. 11, 1973—Notice of appeal of plaintiffs Pell, Segal and Jacobs to the United States Supreme Court filed.

Jan. 7, 1974—United States Supreme Court notes probable jurisdiction of defendants' appeal and grants motion of plaintiffs Hillery, Spain, Bly and Guile for leave to proceed in forma pauperis.

Jan. 21, 1974—United States Supreme Court notes probable jurisdiction of appeal by plaintiffs Pell, Segal and Jacobs, consolidates the case with defendants' case, and allots one hour for oral argument.

Booker T. Hillery, Jr.
Box A-32262
Tamal, California 94964
Plaintiff.

District Court of the United States
Northern District of California

No. C-71-2150
Civil Action

Booker T. Hillery, Jr., Plaintiff,

vs.

California Department of Corrections, Its Agents, Raymond Procunier, Director and Its Agent, Louis S. Nelson, Warden and James W. L. Park, Associate Warden, Does One through Eleven, California State Prison at San Quentin, California, Defendants.

[Filed Nov. 8, 1971]

Class Action Pursuant to Rule 23(a), (b), and (d) of the Federal Rules of Civil Procedure, (Complaint For Injunction Or Of Personal Actual Damages and Punitive Damages).

PLAINTIFF HEREBY MOVE THE COURT FOR A PERMISSIVE INJUNCTION ENJOINING THE DEPARTMENT HEAD FROM ENFORCEMENT, OPERATION OR DENYING PRISON PROCEDURES WHICH DENIES PLAINTIFF AS A CLASS FROM INTERVIEWS, AND FROM HIS REVIEW EDITOR AND STORY EDITOR, IN THAT SUCH DENIAL DEPRIVES PLAINTIFF AS A CLASS OF EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Jurisdiction

Comes Now, Plaintiff who alleges for a first cause of action:

I.

That the true names or capacities, whether individual, corporate, associate, or otherwise, Defendants named herein as Does One Through Eleven are unknown to Plaintiff, therefore Plaintiff sues said Defendants by such fictitious names, and Plaintiff will amend this Complaint to show their true names capacities when the same have been ascertained.

II.

Plaintiff is informed and believes thereon and alleges that each of the Defendants designed herein as Doe is negligent and responsible in some manner for the improper handling of two applications to Editors and caused injury and damages thereby to the Plaintiff as herein alleged.

III.

That Plaintiff and domiciled and reside within the jurisdiction of the Court; that this action arises under the United States Constitution, and particularly Amendment 14, Section two, and under the law of the United States, Title 42, United States Code, Section 1983, and Rule 23 (a), (b), (1), (A), (B), (2), (3) and (d) of the Federal Rules of Civil Procedure.

IV.

That all of said acts set forth throughout this complaint, were committed by defendants, while acting

under the color, and pretense of the statutes, laws, or executive orders of the State of California; and were not committed by him in his individual capacity.

V.

That on September 7, 1971, at San Quentin, California, Plaintiff was and now is the owner of two Stories which was to be Published immediately by Earth Publishing Corporation, and that on September 29, 1971, the Editors wrote to Plaintiff informing him that visiting applications was needed, which said further that it takes about three weeks to process such applications.

VI.

Jurisdiction is found upon the existence of a federal question: That defendants wilfully denies plaintiff as a class in visiting rights, from the interview with Editors, the said defendants refused to acknowledged applications after the return from Editors and unlawfully converted and disposed of said applications to their own use, and cause personal damages to the Plaintiff's that actual damages in the sum of Fifthy Thousand Dollars ($50,000.00.

As and for a Second Cause of Action:

Plaintiff alleges for a second cause of action against the Defendants, Raymond Procunier, Louis S. Nelson and James W. L. Park and Does One throughout this suit as follows:

VII.

That on or about September 29, 1971, Plaintiff entered into an agreement wherein and whereby Editors wanted to have and interview with Plaintiff whereby Defendants denied to Plaintiff, that the Plaintiff was to enjoy peaceful interview of said Editoring his stories.

VIII.

That Defendants, Raymond Procunier, Louis S. Nelson and James W. L. Park, ever since that said date and now does fail and refuses to compensate Plaintiff for the termination of said stories, to wit: the sum of Five Hundred Thousand Dollars ($500,000.00), or to compensate Plaintiff in any manner or any amount what ever.

IX.

Plaintiff move the Court to take judicial notice that the question of whether the denial of visiting rights, per se, is cruel and unusual punishment to the United States Constitution.

When the efforts of a state prisoner to obtain an available state appellate hearing of his denial are frustrated by the actions of penal officials, there has been a violation of the Due Process Clauses, of the 14th Amendment. Reasonable access to the Courts, state and Federal, is Guaranteed by that clause. *(Hollerbach v. United States* (1914) 233 U.S. 165, 169 [58 L. Ed. 898, 34 S.Ct. 553].)

The responsibility of a governmental agency for positive representations it is deemed to have been made

through defective plans and specifications "is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work. . . ." *(United States v. Spearin,* 248 U.S. 132, 137 [63 L.Ed. 166, 39 S.Ct. 59].) Accordingly, the language in section 4 requiring the bidder to "satisfy himself at to the character . . . of surface and subsurface materials or obstacles to be encountered" cannot be relied upon to overcome those representations as to materials and obstacles which the state positively affirms in section 1A-12 not to exist, and plaintiff was entitled to reply and act thereon. Government Code, section 818.8 reads: "A public entity is not liable for an injury caused by misrepresentation by an employee. At the same time, interest affected by the official action taken here and in Willner was nothing less than "the right to follow a chosen trade of profession." (367 U.S. at pp. 895-896 [6 L.Ed.2d at pp. 1236-1237]), whereas "All that was denied [in Caleteria Workers] was the opportunity to work at one isolated and specific military installation." (367 U.S. at p. 896 [6 L.Ed.2d at p. 1236]) cf. 373 U.S. at p. 103 & fn. 2 [10 L.Ed.2d at p. 229].)

See *Endler v. Schulzbank* (1968) 68 A.C. p. 179, "If plaintiff's allegations prove to be accurate, he will be entitled to defend himself in a formal hearing, unless the Commissioner promptly makes such a hearing available the plaintiff, having no adequate legal remedy, will be entitled to a declaration that the Commissioner from further circulating his charges against the plaintiff or otherwise discouraging his employment."

Indeed, even in cases touching the national security, the United States Supreme Court has construed legislation in such a way as to preserve these due process safeguards whenever their disregard might lead to the arbitrary abridgement of the right to practice one's profession. (See *Greene v. McElroy* (1959) 360 U.S. 474 507 [3 L.Ed.2d 1377, 1396-1397, 79 S.Ct. 1400], holding improper a revocation of an engineer's security clearance without full hearing; cf. *Parker v. Lester* (9th Cir. 1955) 227 F.2d 708, 715-721.) As the Court said in Greene, "Certain principles have remained relatively immutable in our Jurisprudence. One of these is that where governmental action seriously injuries an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."

X.

That San Quentin is a State Prison, operated by defendants and their agents in and for the State of California, and if ordered by this Court to provide such interviews that Plaintiff was denied by method of keeping him from seeing Editors.

Wherefore, Plaintiff prays against the Defendants as follows:

1. For the Actual damages taken by the Defendants, or pay to the Plaintiff the sum of Fifty Thousand Dollars ($50,000.00), as a reasonable and just sum for the value of said actual damages.

2. That Plaintiff be warded in the sum of Five Hundred Thousand Dollars ($500,000.00) by the De-

fendants, Raymond Procunier, Louis S. Nelson, and James W. L. Park, for termination of said interviews.

3. For Plaintiff's costs of suit herein.

4. That the Court make all necessary and appropriate orders pursuant to Rule 23 (d) of the Federal Rules of Civil Procedure.

For such other and further relief as the Court may deem just and proper in the premises.

Respectfully submitted,

/s/ Booker T. Hillery, Jr.
Booker T. Hillery, Jr.

Dated: Nov. 1st, 1971.

[Jurat, Verification, Motion to Proceed in Forma Pauperis, and Affidavit in Support of Motion to Proceed in Forma Pauperis Omitted in Printing]

United States District Court
Northern District of California

[Filed Jan. 13, 1972]

[Caption Omitted in Printing]

RETURN TO ORDER TO SHOW CAUSE AND POINTS AND AUTHORITIES IN OPPOSITION TO ISSUANCE OF A PRELIMINARY INJUNCTION OR OTHER EQUITABLE RELIEF

Come Now the defendants, R. K. Procunier, L. S. Nelson, and James W. L. Park, and for a return to the order to show cause heretofore issued by this Court state:

I

The complaint fails to pray for equitable relief, or to state facts showing equitable relief is desired or appropriate.

II

The complaint fails to allege exhaustion of administrative remedies.

III

The complaint fails to allege facts showing a federal right to the relief contemplated, showing irreparable harm, or showing a strong likelihood that plaintiff will ultimately prevail.

Wherefore, it is respectfully submitted that the order to show cause should be discharged and that equitable relief should be denied.

Dated: January 13, 1972

Evelle J. Younger, Attorney General
Herbert L. Ashby, Chief Assistant
Attorney General—Criminal Div.

Doris H. Maier, Assistant Attorney
General—Writs Section

John T. Murphy
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Attorneys for Defendants

Points and Authorities

Petitioner, a condemned inmate of the California State Prison at San Quentin, brings this action under the Civil Rights Act, 42 U.S.S. § 1983, and other purported grounds of jurisdiction.

The complaint, as we read it, alleges that plaintiff owns two stories (it is not specifically alleged that he wrote them), that they were to be "Published immediately by Earth Publishing Corporation," that the editors of said corporation wrote to plaintiff informing him that visiting applications were needed, and that defendants denied said applications. This Court ordered the complaint filed and, on its own motion, ordered defendants to show cause why equitable relief should not be granted pending trial. There are three reasons why no such relief should be granted:

I

The complaint fails to pray for equitable relief or to state facts showing equitable relief is desired or appropriate. The complaint seeks only money damages. It contains nothing indicating that plaintiff has a continuing desire to receive a visit from the editors of Earth Publishing Corporation, that such editors continue to desire to visit him, or that defendants continue to refuse permission for such a visit. For all that appears from the complaint, plaintiff merely wants money and has no desire to have equitable relief granted. We do not doubt the power and duty of this Court liberally to construe the pleading of an untrained prisoner in favor of the pleader. But we

submit that the extraordinary remedy of equitable relief should not be granted in the absence of some indication on the part of plaintiff that it is desired.

II

The complaint fails to allege exhaustion of administrative remedies. The Rules of the California Department of Corrections expressly permit any inmate to send a sealed letter to the Warden of his institution and to the Director of Corrections. It is not alleged that plaintiff has utilized this remedy to attempt to obtain the visiting permits sought.

III

The complaint fails to allege facts showing a federal right to the relief contemplated, showing irreparable harm, or showing a strong likelihood that plaintiff will ultimately prevail.

It should be borne in mind that the complaint does not allege any attempt to restrict the content of plaintiff's writings or any attempt to restrict mail correspondence between plaintiff and any publisher. No claim of access to counsel or courts is involved. Plaintiff's sole assertion is that he has a constitutional right to a personal visit with a publisher or his representative for the purpose of discussing an article or story presumably written by plaintiff. A review of the authorities demonstrate that there is no such right. In general, the cases have upheld restrictions on communications between inmates and noninmates far more stringent than any allegedly imposed on plaintiff.

Theriault v. Blackwell, 437 F.2d 76 (5th Cir. 1971), upheld the dismissal of a habeas corpus petition alleging, inter alia, that prison officials refused to mail a letter and a copy of a brief written by petitioner, to the editor of a newspaper. "As the district court held such letters are not 'legal correspondence' but are subject to the prison regulations which govern mailing lists, approved correspondents, and other such matters." *Id.* at 77.

Labat v. McKeithen, 361 F.2d 757 (5th Cir. 1966), held that a person, like petitioner, confined in death row, could lawfully be kept in solitary confinement and denied access *in person or by mail* to anyone other than prison officers, his attorney, physician, or spiritual adviser, or certain relatives.

Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965), upheld a prison rule limiting to twelve persons, plus certain public officials, those with whom an inmate could correspond.

In *McCloskey v. Maryland,* 337 F.2d 72 (4th Cir. 1964), Judge Haynsworth held that plaintiff, an anti-Semitic propagandist, had no right to correspond with designated persons, including the American Civil Liberties Union and the American Bar Association, for the purpose of propagandizing them or securing legal assistance in aid of his propaganda efforts.

In *Stroud v. Swope,* 187 F.2d 850 (9th Cir.), *cert. denied,* 342 U.S. 829 (1951), it was held that an inmate of a federal prison has no right to any correspondence whatever for the purpose of publishing his writings.

In *McKinney v. DeBord,* 324 F.Supp. 928 (E.D. Cal. 1970), it was held: "[R]efusing to mail out complaints to persons or agencies other than the courts is not constitutionally objectionable, for it is not interference with access to the courts." *Id.* at 933.

Berrigan v. Norton, 322 F.Supp. 46 (D. Conn. 1971), involved a request for a preliminary injunction in an action brought by Frs. Daniel and Philip Berrigan, federal prisoners, for relief from prison rules requiring that outlines of prospective manuscripts be submitted to a prison official for approval and that the inmate author execute an agreement establishing the terms under which a manuscript may be used and ultimately published. "[C]orrespondence with a publisher or literary agent may not be carried on until these conditions have been met." *Id.* at 51-52. The constitutionality of these rules was upheld and the preliminary injunction denied.

One case, *Tyler v. Ciccone,* 299 F.Supp. 684 (W.D. Mo. 1969), found certain rights to prepare manuscripts and negotiate for their publication on the part of an inmate of the United States Medical Center, Springfield, Missouri. However, the plaintiff had not been convicted of any crime, and his unconvicted status was the basis for the court's finding that he possessed rights not enjoyed by inmates generally.

Even courts recognizing broad First Amendment rights on the part of prisoners have limited their rulings to the rights to carry on correspondence, and have stopped short of finding any rights to personal visits. Thus, in *Nolan v. Fitzpatrick,* 326 F.Supp. 209

(D. Mass. 1971), it was held that inmates have a constitutional right, subject to certain restrictions, to send grievance letters to news media. But the court did not hold that they had a constitutional right to be interviewed by media representatives, and rather indicated that they did not: "There have not been shown any administrative considerations of significance which support a prohibition of a grievance letter to a news medium so long as the right to send a letter does not imply as an essential concommitant the right of the prisoner or of a reporter to follow-up personal interviews." *Id.* at 216-217.

In *Seale v. Manson,* 326 F.Supp. 1375 (D. Conn. 1971), while finding the existence of certain First Amendment rights on the part of an unconvicted inmate awaiting trial, the court upheld rules restricting correspondence and visiting rights with friends and business associates and prohibiting interviews with reporters without the approval of the Commissioner of Correction.

We represent to the court that our research has failed to disclose any authority of any sort giving any inmate any federal right under any circumstances to visits or interviews with anyone other than attorneys, physicians, ministers, family and friends. A constitutional right to business visits has not been recognized.

It should be noted that the instant case bears no resemblance to the recent California Supreme Court case of *In re Eli,* 5 Cal.3d 832, 97 Cal.Rptr. 698 (1971). That case held invalid a rule of the Director

of Corrections requiring inmates to donate 25% of their manuscript royalties to the Inmate Welfare Fund. The sole basis of the decision was California Penal Code section 2600, which conferred upon a prison inmate the right to own any written material produced by him during confinement. The rule was held to derogate unnecessarily from the property right granted by that statute. The court expressly refused to consider the petitioners' claims that the rule infringed their First Amendment rights.

Assuming, without conceding, that plaintiff has a First Amendment right to write and publish his writings while in prison, we are unable to see how such a right is infringed by his not being allowed a personal visit with magazine editors. Again, it is not alleged that his correspondence has in any way been curtailed. This Court can take judicial notice that the most common method of communication between publishers and authors is by mail. Writings and publishing are transactions which peculiarly lend themselves to consummation by mail. The normal practice is that an author mails a manuscript to a publisher, who accepts or rejects it, by mail, with or without suggestions. If the manuscript is accepted, the publisher may edit it or may return it to the author for rewriting. There is no reason why any of this cannot be done by mail. Personal contact between authors and publishers is, at least at the pre-publication stage, the exception rather than the rule.

The foregoing is demonstrated by the fact that six of the present condemned inmates of San Quentin

have had their writings published without interviews with the publisher. A list of the names of these men and their publications follows:[1]

Massie, #A-90159: "Teen Recollections from Death Row," Teen Magazine, January, 1971
"Death by Degrees," Esquire, 1970 or 1971

Eli, #B-29114: "A Land Called Freedom," Los Angeles Free Press, March 26, 1971

Welch, #B-22393: "From Christ to Crime to Death Row," Baptist Men's Journal, March 10, 1971
"God is my Cell Mate," Christian Economics, May 6, 1971
"Death Row S.Q. Prison," City Magazine, Ltd., November 22, 1971
"Money Can't Buy God," Christian Freedom Foundation, August 19, 1971
"Christians Come to Jail," Christian Freedom Foundation, September 3, 1971

Robinson, #B-8609: "The End was the Beginning," Christian Freedom Foundation, July 30, 1971

Morse, #A-76006: "The One-Way Street," Listen, December 27, 1971

King, #B-13843: "Happiness is Knowing God," Marian Helpers Bulletin, November 26, 1971

---

[1]Because of time limitations, we have been unable to support this list by affidavit. We beg leave of the court to file such an affidavit at or before the time for hearing on this matter.

To put it simply, if a person is literate enough to write a publishable or potentially publishable article, he is literate enough to arrange for its publication by mail. In the absence of a showing that plaintiff could not arrange for publication of his manuscripts by mail, he has shown no basis for either equitable relief nor damages.

It should be noted that, where a showing of necessity or reasonable purpose has been made, defendants have allowed business visits. However, the general denial of such visits is based on the premise that pointless or unnecessary visits present unreasonable security hazards to prison administration.

Because plaintiff has failed to establish the existence of any federal right to a personal visit from magazine editors, and has failed to show how the alleged denial of such a visit could have prejudiced him in the exercise of any federal right, we submit that he has failed to show either irreparable damage or the strong likelihood of ultimately prevailing on the merits. The preliminary injunction must therefore be denied. *Berrigan v. Norton, supra,* 322 F.Supp. at 47-48.

Conclusion

For the foregoing reasons, we respectfully submit that the order to show cause should be discharged and equitable relief denied.

Dated: January 13, 1972

Evelle J. Younger, Attorney General
Herbert L. Ashby, Chief Assistant
Attorney General—Criminal Div.
Doris H. Maier, Assistant Attorney
General—Writs Section
John T. Murphy
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Attorneys for Defendants

[Declaration of Service Omitted in Printing]

In the United States District Court for
the Northern District of California

[Filed Mar. 8, 1972]

[Caption Omitted in Printing]

FIRST AMENDED COMPLAINT FOR DAMAGES AND DECLARATORY AND INJUNCTIVE RELIEF.

(CIVIL RIGHTS)

I. *Jurisdiction*

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1343(3), 1343(4) and 2201. This is a suit authorized by 42 U.S.C. Section 1983 to redress the deprivation under color of state law of rights, privileges and immunities secured by the First, Fourth, Fifth, and Ninth Amendments, and by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. This is also a proceeding for a declaratory judgment as to plaintiffs' rights to be free from such deprivation by defendants acting under color of state law.

II. *Introduction*

2. This complaint amends the previously filed *in pro per* complaint of Booker Hillary. It seeks to prevent the administration of San Quentin State Prison from improperly denying, under color of state law, prisoners the right to private visits with specific media personnel.

3. The application of prison rules and policies on such visits has been arbitrary and unclear, with the prison administration reserving to itself the power

to decide whether specific media can visit specific prisoners. Various media people, including plaintiffs in this complaint, have requested and do desire to visit specific prisoners, including other plaintiffs in this complaint. The purpose of such visits is to discuss publication of articles written by the prisoners and/or is to gain information for articles to be written by the visiting reporter.

4. The prisoners' rights to free expression and to privacy are also being seriously infringed. The prison administration is arbitrarily denying prisoners, including some of the plaintiffs in this complaint, the right to speak openly and freely with specific media personnel on their own choice, and with specific persons who desire such visits before publishing transcripts prepared by the prisoner.

5. The result of the prison administration's arbitrary limits on such visits has been that the media have gained access only to that information which the prison administration decides to reveal, creating a serious infringement upon the public's right of access, through the press, to information about the prison. Such infringement is especially serious in this case, since the public is unable to obtain this information on its own.

III. *Parties*

6. Plaintiff, Booker T. Hillery, Jr., is and was at all times material herein a prisoner incarcerated in San Quentin State Prison, Tamal, California. He is a black citizen of the United States and a resident of the state of California.

7. Plaintiff, John Larry Spain, is and was at all times material herein, a prisoner incarcerated in San Quentin State Prison, Tamal, California. He is a black citizen of the United States and a resident of the state of California.

8. Plaintiff, Bobby Bly, is and was at all times material herein a prisoner incarcerated in San Quentin State Prison, Tamal, California. He is a black citizen of the United States and a resident of the state of California.

9. Plaintiff, Michael Shane Guile, is and was at all times material herein a prisoner incarcerated in San Quentin State Prison, Tamal, California. He is a white citizen of the United States and a resident of the state of California.

10. Plaintiff, Eve Pell, is and was at all times material herein a free lance writer who has written and edited books and magazine articles concerning prisons and racism. She is a citizen of the United States and a resident of the state of California.

11. Plaintiff, Betty Segal, is and was at all times material herein a reporter for the weekly community newspaper, *Freedom News,* Richmond, California. She is a citizen of the United States and a resident of the state of California.

12. Plaintiff, Paul Jacobs, is and was at all times material herein a free lance writer, an author of many publications concerning racism and prisons, and a reporter for KQED T.V., San Francisco, an educational television station. He is a citizen of the United States and a resident of the state of California.

13. Defendant, Raymond K. Procunier, is and was at all times material herein Director of the Department of Corrections of the state of California. As such Director, he has general supervisory power over all California prisons, including San Quentin Prison. He is sued individually and in his official capacity as Director of Corrections.

14. Defendant, Louis S. Nelson, is and was at all times material herein Warden of San Quentin State Prison. He has general supervision and control of San Quentin, and he is sued individually and in his official capacity as Warden.

15. Defendant, James W. L. Park, is and was at all times material herein Associate Warden of San Quentin Prison. He is sued individually and in his official capacity as Associate Warden.

16. Defendant, Joseph R. O'Brien, is and was at all times material herein Associate Warden of San Quentin Prison. He is sued individually and in his official capacity as Associate Warden.

IV. *Class Action*

17. Plaintiff prisoners bring this action on their own behalf and pursuant to Rule 23(b)(1) and Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other prisoners of San Quentin State Prison subject to defendants' jurisdiction and affected by the policies, practices or acts of defendants complained of herein. The class is so numerous that joinder of all members is impracticable; there are question of law and fact common to the class; the claims and defenses of plaintiffs are typical of the

claims and defenses of the class; and plaintiffs will fairly and adequately protect the interests of the class.

18. Plaintiff people connected with news media bring this action on their own behalf and pursuant to Rule 23(b)(1) and Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other people connected with news media who are affected by the policies, practices or acts of defendants complained of herein. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims and defenses of plaintiffs are typical of the claims and defenses of the class; and plaintiffs will fairly and adequately protect the interests of the class.

V. *Facts*

19. Plaintiff, Booker T. Hillery Jr., a black prisoner at San Quentin, is the writer of two short stories about which he was negotiating with *Earth Magazine* for publication.

20. During September 1971, both Jane Harada, Review Editor, and Lloyd Linford, Stories Editor, of *Earth Magazine* requested permission from prison officials to visit plaintiff Hillery for the purpose of discussing publishing Mr. Hillery's writings, and for the purpose of gaining information for their own articles concerning prisons.

21. In letters to both Ms. Harada and Mr. Linford dated October 5, 1971, defendant Associate Warden Park, in behalf of defendant Warden Nelson, denied requests for a visit with plaintiff Hillery. (See Exhibits A and B attached to this complaint.)

22. Plaintiff Hillery was unable to meet with eitheir of the requested editors from *Earth Magazine*, his articles were not published, and he thereby has incurred a loss of $550,000.

B. *John Larry Spain—Eve Pell*

23. Plaintiff Eve Pell is a free lance author and editor of publications concerned with the oppression of third world peoples in the United States and also the conditions of the adjustment centers in California prisons. On February 12, 1972, plaintiff Pell requested permission to interview plaintiff John Larry Spain. (See Exhibit C attached to this complaint.)

24. In response to her request, on February 15, 1972, defendant O'Brien denied her application. (See Exhibit D attached to this complaint.)

25. John Larry Spain is a talented black writer who has spent much time in San Quentin's adjustment center. One of his letters has already been published in a recent book, edited by plaintiff Pell, *Maximum Security,* Dutton 1972. Plaintiff Spain was housed in the adjustment center at San Quentin on August 21, 1971, the day that George Jackson and five others were killed. Information concerning that eventful day has only been released by prison officials at this time.

C. *Bobby Bly—Betty Segal*

26. On February 6, 1972, plaintiff Betty Segal wrote a letter to defendant Nelson requesting permission to interview plaintiff Bobby Bly, regarding a law suit he had filed in the United States District

Court for the Northern District of California. *(Bly v. Procunier,* C-71-2019 AJZ, now pending before the court) The letter made plain that plaintiff Segal was requesting to visit plaintiff Bly with a view toward publication of information relevant to the pending court action. The suit involves allegations that San Quentin prison officials arbitrarily and unfairly locked up over one hundred prisoners, primarily black and chicano, because of their political beliefs and not because of any violation of prison rules or regulations. This information would be published in the *Freedom News.* This request is attached to this complaint as Exhibit E.

27. On February 16, 1972, defendant O'Brien replied to plaintiff Segal's visitation request. The reply denied plaintiff the opportunity to visit with plaintiff Bly now or in the foreseeable future. The reply is attached to this complaint as Exhibit F. Plaintiff Bly was never informed of this request by defendants.

28. Plaintiff Segal has now and will continue to have a legitimate and necessary need to meet with plaintiff Bly. The information which plaintiff Segal needs pertains directly to both factual and subjective material necessary to convey a complete representation to the public at large of the issues raised in the action filed by plaintiff Bly.

D. *Michael Shane Guile—Paul Jacobs*

29. KQED educational television reporter, plaintiff Paul Jacobs, requested permission to interview plaintiff Michael Shane Guile, a white prisoner at San Quentin, on February 15, 1972, in order to discuss

prison conditions, recent events at San Quentin, and to obtain his views of racism and the relationship between blacks and whites within the walls. (See Exhibit G attached to this complaint.)

30. On February 17, 1972, defendant O'Brien replied to Jacobs and denied his request to see plaintiff Guile. (See Exhibit H attached to this complaint)

E. *Discrimination*

31. At this time other media representatives have interviewed specific prisoners at San Quentin Prison. (See Exhibit I attached to this complaint)

VI. *Equity*

32. Plaintiffs and members of their classes have no plain, adequate or speedy remedy at law to redress the wrongs alleged herein, and this suit for declaratory judgment and an injunction is their only means of securing adequate relief. Plaintiffs and members of the classes they represent are now suffering and will continue to suffer irreparable injury from defendants' policies as set forth herein.

VII. *Prayer*

33. Wherefore, Plaintiffs respectfully pray that this court enter judgment granting plaintiffs and all members of their classes:

(a) A declaratory judgment that Defendants' acts, policies and practices complained up herein violate Plaintiffs' rights and the rights of members of the Plaintiffs' classes secured by the First, Fourth, Fifth, and Ninth Amendments and by the due process and

equal protection clauses of the Fourteenth Amendment.

(b) A preliminary and permanent injunction prohibiting defendants from denying permission for interviews between prisoners and persons representing various media, including but not limited to plaintiffs and classes in whose behalf this suit has been brought.

(c) A preliminary and permanent injunction requiring Defendants, their agents, and employees to formulate, promulgate and institute specific rules and regulations to expediate visits between prisoners and media persons, including but not limited to plaintiffs and classes in whose behalf this action has been brought.

(d) Compensatory damages in the amount of $550,000.00 for the Plaintiff Hillery, and punitive damages in the amount of $25,000.00 for each named plaintiff and each member of plaintiffs' classes.

(e) A trial by jury.

(f) That this court retain jurisdiction over the parties and matters herein mentioned.

(g) For Plaintiffs' costs and attorney fees for this suit.

(h) And for such other and further relief as this court shall in its judgment find fit and proper.

Dated: March 8, 1972

/s/ Richard M. Doctoroff
Richard M. Doctoroff
Patti Roberts
5406 Clarement Avenue
Oakland, California 94618

Exhibit A

(Letterhead of
State of California—Human Relations Agency
Department of Corrections
California State Prison
San Quentin, California 94964
Ronald Reagan, Governor)

October 5, 1971

Re: Hillery, Booker T. Jr.
A-32262
Condemned

Miss Jean Harada, Review Editor
Earth Publishing Corp.
The Agriculture Bldg.
Embarcadero at Mission
San Francisco, California 94105

Dear Miss Harada:

We regret to inform you that you have been denied visiting privileges with Mr. Hillery as you are not a friend of prior acquaintance.

Very truly yours,
L. S. Nelson, Warden
By James W. L. Park
Associate Warden
Administration

JWLP:ss
cc: Inmate

Exhibit B

(Letterhead of
State of California—Human Relations Agency
Department of Corrections
California State Prison
San Quentin, California 94964
Ronald Reagan, Governor)

October 5, 1971

Re: Hillery, Booker T. Jr.
A-32262
Condemned

Mr. Lloyd Linford
Earth Publishing Corp.
Agriculture Bldg, Embarcadero at Mission
San Francisco, California 94105

Dear Mr. Linford:

We regret to inform you that you have been denied visiting privileges with Mr. Hillery, as you are not a friend of prior acquaintance.

Very truly yours,

L. S. Nelson, Warden
By James W. L. Park
Associate Warden
Administration

JWLP:ss
cc: Inmate

Exhibit C

February 12, 1972

Warden Nelson
San Quentin State Prison
Tamal, Ca. 94964

Dear Warden Nelson:

I am writing to request permission to interview Mr. John Larry Spain, B-8672. I have permission to do so from his attorney, Elaine Wender.

I am co-author of *To Serve the Devil,* a history of different racial groups in the United States (with Paul Jacobs and Saul Landau) and editor of *Maximum Security: Letters from Prison,* recently published by E. P. Dutton and Co., and I have written for magazines as well.

I would like to discuss with Mr. Spain prison conditions, his opinions about the prison movement growing in the nation, and other matters.

Sincerely,
Eve Pell

Exhibit D

(Letterhead of
State of California—Human Relations Agency
Department of Corrections
California State Prison
San Quentin, California 94964
Ronald Reagan, Governor)

February 15, 1972

Re: Spain, John Larry
B-8672

Ms. Eve Pell
2308 Divisadero Street
San Francisco, Ca. 94115

Dear Ms. Pell:

Your recent letter to Warden Nelson requesting permission to interview Mr. Spain has been referred to me for reply.

Departmental policy does not allow for interviews with specific inmates.

Very truly yours,

L. S. Nelson, Warden

/s/ J. R. O'Brien
Information Officer

JRO'B:ajr

Exhibit E

February 6, 1972

Warden Louis Nelson
San Quentin Prison
Tamal, Calif. 94964

Dear Warden Nelson:

I am writing this letter to ask formal permission to interview an inmate by the name of Bobby Bly, A-67097. He is one of the plaintiffs in a Federal court action in which our newspaper is interested.

If possible, I would like permission to interview Mr. Bly either this coming Friday in the afternoon, or the Friday following at any time of day. During the coming week it is not possible for me to come to the prison any other day but Friday.

I sincerely hope you will see fit to allow me to interview this man.

Very sincerely yours,

Elizabeth K. Segal

Exhibit F

(Letterhead of
State of California—Human Relations Agency
Department of Corrections
California State Prison
San Quentin, California 94964
Ronald Reagan, Governor)

February 16, 1972

Re: Bly, Bobby
A-67097

Ms. Elizabeth K. Segal
Freedom News, Inc.
Box 1087
Richmond, Ca. 94802

Dear Ms. Segal:

In reply to your letter of 2/6/72 to Warden Nelson, this has been referred to me for reply.

Presently we do not have interviews with specific inmates by press representatives.

All men are able to have interviews with attorneys whey they request a visit with an attorney.

Very truly yours,

L. S. Nelson, Warden
/s/ J. R. O'Brien
Information Officer

ajr

Exhibit G

February 15, 1972

Warden Louis Nelson
San Quentin Prison
Tamal, California 94964

Dear Warden Nelson:

I would like permission to interview Mr. Michael Shane Guile, B 5757, at Tamal for some work I am doing in preparing a television program on how prisoners see the prison system. I have the permission of Mr. Guile's attorney, Richard Doctoroff, for this interview. Please let me know if this is agreeable to you.

Sincerely yours,
[Paul Jacobs]

PJ:dd
blind carbon copy: Eve Pell

Exhibit H

(Letterhead of
State of California—Human Relations Agency
Department of Corrections
California State Prison
San Quentin, California 94964
Ronald Reagan, Governor)

February 17, 1972

Re: Guile, Michael Shane
B-5757

Mr. Paul Jacobs
2500 Filbert Street
San Francisco, Ca. 94123

Dear Mr. Jacobs:

In reply to your letter of February 15, 1972, regarding an interview with Mr. Guile, presently we have regulations that do not allow for interviews with specific inmates.

Very truly yours,

L. S. Nelson, Warden
/s/ J. R. O'Brien
Information Officer

ajr

Exhibit I

THE SAN QUENTIN SCROUNGER

(Picture Omitted)

Inventor Bob Lokey Demonstrated His Power-Saw Safety Brake
San Quentin Fire Chief Stan Nordstrom turned the crank
By Jim Brewer

You don't hear much about San Quentin inmates like Bob Lokey.

Like thousands of others of the infamous prison in Marin county, the sandy haired native of Texas puts in his time and waits for the day when he can return to the world outside.

During the nine years Lokey has served toward his possible life sentence, he has gained a reputation on the inside rivaling that of the more controversial inmates.

Fellow inmates know him as a scrounger. His closest associates know him as a budding genius. And prison officials know him as a man "who has really found himself."

But all of them know him better as an inventor.

Models

Working only in his spare hours, Lokey has designed and built working models for a variety of new gadgets including:

⊙ A machine that writes faster than previous methods of Braille transcription.

⊙ A magnetized screwdriver that can be demagnetized with a flip of the wrist.

⊙ A typewriter alignment tool.

⊙ A collapsible wheel block for heavy trucks.

Demonstration

In a tool shed behind the prison firehouse where he puts in his daily work time, Lokey demonstrated his most prized invention for The Chronicle last week.

"It's a working model of a power-saw safety device that will allow wood to be cut or ripped, but will not allow the cutting of human flesh," he said.

"Just don't say too much about how it works. I don't have a patent on it yet."

The makeshift power saw, not unlike the ones you find in the home workshop, was activated. Lokey placed a small piece of wood behind the whirling blade and inched his index finger closer and closer.

With less than a quarter inch left between his finger and the blade, the machine snapped to a halt.

"It's impossible to cut human flesh with it," he said. "Even a 5-year-old could operate it in complete safety."

To prove his point, Lokey made a simple adjustment and repeated the demonstration. The saw blade again slammed shut—this time with more than two inches between his finger and the blade.

"It makes use of an amplified radio frequency," Lokey said. "Just leave it at that."

Idea

The 31-year-old inmate said the idea for the safety saw "just occurred to me one day." Lokey explained, "I just figure it out in my mind first and then build. This one took me about three years."

He limits himself to materials that are available inside the walls. "The administration cooperates with me, but I don't like to ask for expensive stuff. Broken down junk is good enough."

When Lokey arrived at San Quentin, he had a tenth-grade education. Today, he has an associate of arts degree in the social sciences. He is also president of Lokey Tool, Inc., a company he recently formed with two partners on the outside.

"I really enjoy tinkering more than anything else I've ever done," he said. "When I do get out of here, they won't have to worry about me doing anything anti-social. All I want is to find a place to work."

United States District Court
Northern District of California

[Filed Mar. 10, 1972]

[Caption Omitted in Printing]

AFFIDAVIT OF JAMES W. L. PARK

James W. L. Park, being first duly sworn, deposes and says:

I am Associate Warden Administration of the California State Prison at San Quentin.

I have read Defendants' Return to Order to Show Cause and Points and Authorities in Opposition to Issuance of a Preliminary Injunction or Other Equitable Relief filed in the above-entitled matter. The matter appearing on page 8, line 4, through page 9, line 5, thereof is true and correct, according to the records of the California State Prison at San Quentin.

I declare, under penalty of perjury, that the foregoing facts are true and correct according to the best of my knowledge and belief, and that if called as a witness, I could testify competently thereto.

Dated:

James W. L. Park

[Jurat Omitted in Printing]

United States District Court
Northern District of California

[Filed Apr. 6, 1972]

[Caption Omitted in Printing]

NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

To: Richard M. Doctoroff
Patti Roberts
Attorneys at Law
2308 Divisadero
San Francisco, California
Counsel for Plaintiffs

Please Take Notice that defendants will move this Court, in the courtroom of the Honorable Spencer Williams, United States District Judge, at the United States Court House, 450 Golden Gate Avenue, San Francisco, California, 94102, at 10:00 a.m., or as soon thereafter as counsel may be heard, on Friday, April 28, 1972, for an order dismissing the complaint for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure, Rule 12(b), and for failure to raise a substantial federal question.

If the court and counsel for plaintiffs so desire, and counsel wish to waive time, defendants will be prepared to argue this motion at the next scheduled hearing on this matter, April 17, 1972, at 1:30 p.m.

This motion will be based on all the records and files in this case, together with the proposed order and

memorandum of points and authorities attached hereto, which shall also serve as a memorandum of points and authorities in opposition to plaintiff's motion for preliminary injunction.

Dated: April 5, 1972

Evelle J. Younger, Attorney General
Herbert L. Ashby, Chief Assistant
Attorney General-Criminal Division

Doris H. Maier, Assistant Attorney
General-Writs Section

John T. Murphy
Deputy Attorney General

/s/ George R. Nock
Deputy Attorney General
Attorneys for Defendants

Points and Authorities

Under the complaint, as amended, this is an action under the Civil Rights Act, 42 U.S.C. section 1983, brought by plaintiffs, who are inmates of the California State Prison at San Quentin, and media personnel who have sought to interview prisoners, seeking injunctive relief and damages. Plaintiffs attack California Department of Corrections Administrative Manual section 415.071, which provides: "Press and other media interviews with specific individual inmates will not be permitted." Plaintiffs allege that application of this rule has denied them an asserted constitutional right to interviews between prison inmates and media representatives.

Plaintiffs read the rule as barring any interviews between inmates and the media, and also claim discrimination by citing an instance of an interview which took place after adoption of the rule. Both this reading and the claim based thereon are inaccurate. Although requests from the media to interview specific inmates are not honored, media representatives are permitted to enter the institution and interview inmates whom they might encounter, and who are willing to be interviewed. The interview cited by plaintiffs is merely evidence of implementation of this policy.

The gravamen of the complaint and of plaintiffs' points and authorities is the assertion of a First Amendment right on the part of media representatives to enter state prisons and there interview any inmate whom they designate, and a correlative right on the part of the inmate to be interviewed. Plaintiffs claim that the public "right to know" confers on the media a constitutional right of access to any prison inmate. They further strongly imply, but do not formally allege, that the purpose of the rules under challenge is the protection of prison officials from criticism concerning prison conditions by preventing these conditions from receiving public attention. Plaintiffs' constitutional claims are unfounded and their implication false and baseless. It is our position that the complaint not only fails to state a claim upon which relief may be granted, but totally fails to raise a substantial federal question, and should therefore be dismissed.

The issues might be illuminated by a bit of background on the rules in question. The Department of Corrections had virtually no restriction on press interviews with inmates until August 1971. Under former procedures, news reporters were permitted to interview consenting inmates. The only exceptions were individual cases in which the warden denied interviews for security reasons or out of concern for the welfare of the inmate. Such denials were rare. The warden also retained the rarely used prerogative to impose special controls in individual cases.

This procedure ultimately became unworkable. As California correctional institutions began to receive inmates who were particularly newsworthy, usually because of their activities before coming to prison, certain problems emerged. The first problem was that interviews with such newsworthy inmates were consuming an intolerable number of man-hours on the part of institutional personnel required to provide security and escort service for the interviews. The second, and more serious, problem arose from the fact that certain inmates were receiving wide media exposure. This exposure made heroes of the particular inmates, and conferred upon them the status of inmate leaders. Their leadership status, in turn, created serious disciplinary problems at the institutions.

The seriousness of the disciplinary problems became clear on August 21, 1972, when an escape attempt resulted in the deaths of several correctional officers and the inmate who had received perhaps the widest media exposure. The pendency of a criminal

prosecution resulting from that escape attempt precludes our commenting upon it in detail. Two days later, on August 23, the rule under challenge was adopted. We will submit that the rule is clearly reasonable and denies no constitutional right of plaintiffs or anyone else.

It is worthwhile to clarify what is in issue and what is not. We do not deal here with the issue of the existence of a right on the part of media to enter prisons and interview prisoner or a right of prisoners to be interviewed. Nor do we deal with the issue of a right on the part of prisoners to write letters to the media. Nor do we have a case of prison officials attempting to deny the public information about prison conditions, whether that information comes from the prisoners or from the media. Media access to the prisons is afforded. The subject matter of interviews is not restricted. Prisoners may write letters to the media and are free to criticize prison administrators and detail their grievances concerning prison conditions. The only issue presented by the complaint is whether the Fourth Estate has the federal constitutional right to enter state prisons and interview whomever they wish. There is no such right.

We will not undertake to examine for the Court each of the voluminous citations in plaintiff's thoroughly-researched memorandum, for they all seem to be directed to the proposition that there is indeed a First Amendment, or that some First Amendment rights intrude into the prisons. We are not inclined to dispute either proposition. But plaintiffs have

failed to cite a single case (unsurprisingly, as we have found no such case) holding that there is a constitutional right of the media to interview prisoners or of prisoners to be interviewed. The cases holding that there is no such right are set forth in detail in our earlier Return to Order to Show Cause, etc., which we incorporate by reference herein. More importantly, plaintiffs have failed to cite any authority for their proposition that defendants' regulations refusing to allow the media to interview specific inmates amount to an unconstitutional "prior restraint" on activity protected by the First Amendment.

The vice in plaintiffs' argument consists of its failure to appreciate the difference between the protected activity of publishing information in the possession of the publisher and the activity, unprotected by the First Amendment, of *gathering* information. The distinction was set out by the Supreme Court in *Zemel v. Rusk,* 381 U.S. 1 (1965), which upheld denial of a passport to Cuba against the contention that the petitioner had a First Amendment right to go to that country and inform the American public of conditions there:

> "[W]e cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of *action.* There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example,

> the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* at 16-17. (Emphasis added.)

Accord, Worthy v. Herter, 270 F.2d 905, 908 (D.C. Cir. 1959); *Dayton v. Hunter,* 176 F.2d 108 (10th Cir.), *cert. denied,* 338 U.S. 888 (1949); *Trimble v. Johnston,* 143 F.Supp. 651 (D.D.C. 1959).

Similarly, in denying an injunction against enforcement of a state court rule preventing the taking of pictures in a courtroom or its environs, the Third Circuit disposed of the appellant's First Amendment claim:

> "Realizing that we are not dealing with freedom of expression at all but with rules having to do with gaining access to information on matters of public interest, can it be argued that here there is some constitutional right for everybody not to be interfered with in finding out things about everybody else? We suppose it would not be contended that a newspaper reporter or any other citizen could insist upon entering another's land without permission to find out something he wanted to know. In the same way merely because someone's private letters might be interesting as gossip or as models of English composition it would hardly be argued that one could open another's desk and read through what he finds there.

> Could an interested observer insist on the constitutional right to take motion pictures of a private family in and about its household contrary to that family's wishes? We think that this question of getting at what one wants to know, either to inform the public or to satisfy one's individual curiosity is a far cry from the type of freedom of expression, comment, criticism so fully protected by the first and fourteenth amendments of the Constitution." *Tribune Review Publishing Co. v. Thomas,* 254 F.2d 883, 885 (3d Cir. 1958).

And in rejecting the First Amendment and Equal Protection claims of a small newspaper which had been denied press credentials given to larger publications, entitling their holders to cross police and fire lines, the California Court of Appeal nicely summed up the law:

> "Restrictions on the right of access to particular places at particular times are consistent with other reasonable restrictions on liberty based on the police power, and these restrictions remain valid even though the ability of the press to gather news and express views on a particular subject may be incidentally hampered." *Los Angeles Free Press, Inc. v. City of Los Angeles,* 9 Cal.App.3d 448, 455, 88 Cal.Rptr. 605 (1970).

It is worthy of note that the courts themselves have taken the lead in restricting the media in their news gathering efforts, by drying up their sources, when deemed necessary or desirable to subserve other values. Vital to the resolution of the entire "fair trial-free press" controversy is the ability of trial courts to issue valid orders preventing parties litigant and

their counsel from talking to the press or public about their cases. Such orders have been upheld. *See, e.g., United States v. Tijerina,* 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969).

So much for the claimed First Amendment right of the press to enter San Quentin and interview whomever they designate. Plaintiffs' other claim, that prison inmates have a First Amendment right to be interviewed by anyone wishing to interview them, is no more substantial. Any rights of inmates, to free expression or to petition, are adequately protected by their being allowed to write letters to the media complaining of their grievances, and by being allowed to participate in interviews by media representatives who enter the institution and interview inmates they might encounter. Any First Amendment rights which inmates may enjoy are clearly subject to limitation in the light of reasonable state interests in such limitation. We have previously detailed the factors—undue consumption of time, and breakdown of prison discipline—which led to the adoption of the rules here under challenge, and submit that these factors demonstrate the reasonableness of the regulations.

In sum, we deal here with rules which give the media and the inmates maximum access to one another consistent with legitimate security interests of state prisons. Protection of prison officials from criticism and the covering-up of prison conditions from the public are neither the motivation nor the effect of the rules. In its interviewing and letter-writing policies, the California Department of Corrections has volun-

tarily gone further than any other American penal system of which we are aware. The Constitution does not require it to go still further.

Conclusion

For the foregoing reasons, it is respectfully submitted that the complaint should be dismissed.

Dated, April 5, 1972.

Evelle J. Younger, Attorney General
Herbert L. Ashby, Chief Assistant Attorney General-Criminal Division
Doris H. Maier, Assistant Attorney General-Writs Section
John T. Murphy,
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Attorneys for Defendants.

[Proposed Order and Declaration of Service Omitted in Printing]

GRN: jkh SF CR 019920

United States District Court
Northern District of California

[Filed April 10, 1972]

[Caption Omitted in Printing]

DEFENDANT NELSON'S ANSWERS TO INTERROGATORIES

1. Under what circumstances do you allow prisoners to interview outside media who request an interview with a specific prisoner?

A: None.

2. Under what circumstances do you refuse to allow a specific prisoner to interview outside media?

A: An interview is disallowed only if it is specifically requested, or if the inmate is deemed too dangerous to risk an interview.

3. Under what authority do you refuse to allow interviews by outside media with specific prisoners? Cite all rules and regulations, written or unwritten. Also cite all policies, formal and informal.

A: Department of Corrections Administrative Manual Section 415.071, which provides: "Press and other media interviews with specific individual inmates will not be permitted." San Quentin Institution Order No. 300, copy attached hereto.

4. Over the past year (Feb. 20, 1971-Feb. 20, 1972) how many prisoners have requested interviews with outside media? List their names, and the names and addresses and publications of the outside media involved in each case.

A: We have no record of this information. Requests by prisoners for interviews with media are rare, and none are recalled.

5. Over the same past year, how many outside media persons requested interviews with prisoners? List their names, media affiliations, and addresses, and the prisoner involved in each case.

A: We have no record of this information.

6. How many of prisoners' requests listed in Interrogatory 4 were refused? List them.

A: We have no record of this information.

7. How many of the media people's requests listed in Interrogatory 5 were refused? List them.

A: We have no record of this information.

8. In each case listed in Interrogatories 6 and 7, explain why the request was refused. Who refused the request? What was his authority? What was his reason? What was the authority for that reason?

A: We have no record of this information.

9. In your answer to Interrogatories 4 and 5, under what circumstances was a media person allowed to interview a specific prisoner? Under what circumstances was an interview not allowed?

A: We have no record of this information.

10. In granting or denying an interview request is it significant whether prisoner or the media person made the interview request? If so, list every case cited in Interrogatories 4 and 5 in which this was a factor, and note if it was determinative of the case.

A: It is not significant whether the prisoner or the media person made the interview request, as Administrative Manual section 415.071 precludes its being granted in either case.

11. Do you view an interview between a prisoner and a media person as a security threat to the institution? Explain. List every case cited in Interrogatories 4 and 5 in which this was a factor, and note if it was determinative of the case.

A: An interview between the media person and an inmate is a security threat only when the inmate is personally dangerous or such interviews are so numerous that the visiting room is crowded with dangerous and/or escape-prone inmates.

12. Is timely notice a factor in deciding whether to allow an interview? List every case in Interrogatories 4 and 5 in which this was a factor, and note if it was determinative of the case.

A: Timely notice was a factor prior to August 21, 1971. No specific cases are recalled.

13. What are the rules, regulations, and policies regarding visiting privileges? Who may visit prisoners? When (specify days and hours)? Where?

A: See current visiting rules attached hereto.

14. Are there any rules, regulations or policies formal or informal, for interviews between prisoners and the outside media? What are they?

A: See San Quentin Institution Order No. 300, attached hereto; Administrative Manual section 415.071.

15. In what instances may the substance of prisoners' writings lead you to refuse the prisoners permission to interviews related to his writings? Unrelated to his writings?

A: The substance of prisoners' writings may be the basis for refusing a prisoner permission for an interview related to his writings only if his writings are of a character excludable from the institution pursuant to California Penal Code section 2600. In no case heretofore has an interview been denied for that reason. The substance of a prisoner's writings would not lead me to refuse permission for an interview unrelated to his writings.

16. In what instances may the substantive content of different outside media lead you to refuse them permission to interview a specific prisoner?

A: Only if the publication actively and characteristically advocated murder. No refusal on this basis is recalled.

17. In what instances may experiences with previous interviewing by a prisoner or by a media person lead you to refuse to grant a future interview with the same or other media person?

A: A subsequent interview by the same media person would be refused if that person had engaged in violence or smuggling of contraband into the institution, or had violated the visiting rules. Conduct by an inmate which showed him to be dangerous would prevent him from being interviewed.

18. In Interrogatories 15, 16, and 17; list every instance where the refusal has been made.

A: We have no record of this information.

19. Which officer(s) and/or employee(s) determine whether an interview may take place? Under what authority?

A: This information is contained in San Quentin Institution Order No. 300, attached.

20. Is the classification of a prisoner relevant to whether he may be interviewed? List all relevant classifications (e.g. Death Row; AC; B Section; the various blocks; work furlough; etc.) and cite the rules, regulations, and policies for each.

A: No, except as noted in San Quentin Institution Order No. 300, attached. No interviews are permitted with inmates in the Adjustment Center.

21. In Interrogatory 20, list every case cited in Interrogatories 4 and 5 in which the classification of the prisoner was a factor in the acceptance or refusal of the interview request. In each case, note if it was determinative of the case.

A: We have no record of this information.

Note: Lest the above answers appear misleading, it should be noted that media persons are permitted to enter the institution and interview inmates whom they happen to encounter, and who are willing to be interviewed. If a media representative desires to interview a condemned man, the selection of the inmate

to be interviewed is made at random from among those inmates willing to be interviewed. If more than one condemned inmate is sought to be interviewed, the interviewer is obliged to pay the escort charges for the second and each subsequent inmate interviewed.

I declare, under penalty of perjury, that the foregoing facts are true and correct, according to the best of my knowledge and belief, and if called as a witness, I could testify competently thereto.

Dated: April 7, 1972

/s/ L. S. Nelson

[Jurat Omitted in Printing]

CALIFORNIA STATE PRISON
SAN QUENTIN

Institution Order No. 300

Subject: *San Quentin Public Information and Community Relations Plan*

References: Director's Rules, Chapter IV, Article I and Sections 415, 420, 421 and 422 of the Departmental Administration Manual.

General Policy: Employees must conform to all provisions of the Director's rules and of the Departmental Administrative Manual in carrying out this plan.

I. *Definitions:*

A. *Public Information* is all information supplied to the public in recognition of their right to be informed about the operations, problems, programs and goals of San Quentin and of the Department of Corrections. The term "public" includes both the broad audience reached by news media and a large group of special "publics" such as employees, inmates, business men, union members, educators, service clubs, law enforcement agencies, etc., each of whom have particular interests in various aspects of San Quentin's program.

B. *Community Relations* is the constructive integration of San Quentin and its employ-

ees into the life of both the adjacent communities and the broader community of citizens whose interests are served by the institution and its activities. Community understanding of program objectives and their acceptance of program methods are vital to good community relations. Each employee by his works and actions has an important effect upon community understanding and acceptance of San Quentin.

II. *Objectives of the Public Information and Community Relations Program:*

A. To provide factual, unbiased information about unusual events occurring in the institution.

B. To provide balanced, objective information about the less spectacular but vital elements of the ongoing San Quentin program.

C. To elicit public understanding of and participation in the institutional program.

D. To inform the public about San Quentin Service to society in the prevention of crime through incarceration and re-socialization of offenders.

E. To educate each employee to his responsibilities for the presentation of an accurate and well-balanced picture of the institution.

III. *Organization of Public Information:*

A. The Warden of San Quentin approves and releases all public information, either personally or through specifically designated staff.

B. *The Information Officer:*

1. Releases spot news and answers press inquiries during the regular work day, informs the Warden of releases made, and consults with the Warden prior to releasing news of major occurrences.

2. Coordinates the public information program, clearing press releases developed by other staff members, and providing technical assistance to staff in developing news features.

3. Develops press releases concerning special events and on-going programs.

4. Arranges for special press interviews with staff and inmates, filming of events, etc.

5. Provides technical guidance and gives assignments to the inmate press office, with the cooperation of the Supervisor of Education.

C. *The Officer of the Day:*

1. Releases spot news and answers press inquiries during other than regular working hours.

2. Checks daily with the Warden's Office regarding possibly press inquiries and special events.

D. *Division Heads:*

1. Are responsible for the development of informative news releases concerning their areas of operation. Either complete releases or compilations of information that can be built into a release are routed to the Information officer for clearance.

2. Through staff training create an appreciation of the value of constructive news releases, and encourage their staff to develop same.

3. Are responsible to see that any unusual occurrences, acts of heroism, efforts beyond the call of duty, extraordinary achievement, etc., are referred promptly to the Information Officer for possible press release.

IV. *Policies and Procedures in the Administration of Public Information:*

A. Release of News:

1. Release of spot news by authorized personnel is made to the three newspapers maintaining regular reporters in Marin County. One call to the Marin Press Release Service will reach these papers:

Tlhe San Rafael Independent Journal
Tlhe San Francisco Examiner
Tlhe San Francisco Chronicle
United Press International
Associated Press

2. Release of feature news is made to these three papers, and to other newspapers, wire services, radio and television stations as may be desirable. Feature news releases will be approved by the Warden's Office in every instance.

B. Press contacts by employees on institutional matters is limited to authorized staff or when express permission is granted.

C. Inquiries re development of feature articles by freelance writers, magazines, press services, etc., will always be referred to the Warden's Office for review and referral for Central Office approval when necessary.

D. Interviews of employees by the press and appearance on television or radio must receive prior approval from the Warden's Office. Involvement in controversial subjects will be such that it is clear that the employee is not speaking for the institution, unless authorized to do so.

E. Interviews of inmates by news media:
1. Will be cleared through the Information Officer who will consult with the Warden in controversial or notorious cases.

Rev. 2. Require the consent of the inmate on the CDC 146. Photographing of inmates will require similar approval, although ID shots can be given upon request and without consent since they are a public record.

Rev. 3. Requires supervision appropriate to the type of case. Interviews with men on maximum custody, isolation or administrative segregation will be permitted only if no undue security hazard is present.

4. Interviews with condemned men will always be processed through the Associate Warden, Administration, and the detailed provisions of AM 415 will be followed.

Rev. 5. Inmates awaiting trial will not be interviewed until the trial is concluded.

F. Supervision of television or motion picture crews will be arranged by the Information Officer, as follows:

1. Short news and features: by the Information Officer or by custodial personnel. If the short features involves a particular area, staff from that division may be asked to supervise.

2. For filming sequences, filming agency may be asked to pay for custodial supervision.

V. *Guidelines for Dealing With News Media:*

A. The policy of San Quentin is to give the reporters all reasonable assistance in developing a story, since this aids in the mutual task of informing the public.

B. Answer all inquiries briefly, factually and objectively, without bias, personal opinions or dramatic effects. Answers should be confined to established policy and official information. Personal opinion, especially in controversial matters, should not be released as news. Evaluate statements issued as to the impression they will create if printed out of context and without explanation. Do not issue facetious, cynical or humorous statements, nor use prison jargon or slang.

C. Information released regarding inmates should be limited to objective statements in answer to specific questions from the official record: i.e., age, offense, legal status, assignment, number of disciplinary infractions, etc., privileged information such as psychiatric diagnosis, details from social or other diagnostic interviews, personal attitudes to family, etc., will not be released.

D. Never volunteer "exclusive" stories to one reporter. If a reporter, through his own initiative, develops an exclusive story or information, this "exclusive" should be honored and other reporters should not be told

of this. The activities of one reporter must not be told to others.

VI. *Administration of Community Relations Program:*

A. All employees are responsible to convey objective, realistic information about San Quentin to the public on the job, in community groups and in private contacts.

B. All formal community relations programs will be approved by the Warden prior to being placed into effect. When basic policy has been approved, the staff member responsible will carry out the details of his program, using imagination and initiative in developing information and public participation.

C. The Warden, with the assistance of the Information Officer, will coordinate the various community relations programs.

D. Tours by groups and individuals will be arranged through the Warden's Office.

E. Visits to the Adult Authority are cleared through the Classification and Parole Representative.

VII. *Methods of Encouraging Positive Community Relations:*

A. Public tours of the institution:

1. During the months of February through October, tours of mixed groups, soci-

eties, clubs, etc., of approximately 200 adults, are conducted on Saturday nights. A charge is made to cover costs of food, escort, and a contribution to the Inmate Welfare Fund. The Officer of the Day is ordinarily in charge.

2. Specific reservations are required for individuals or groups. Arrangements are made through staff designated by the Warden.

3. Tours by approved special guests will be arranged by the Warden's Office at any time during the normal working day. The Custodial Division will furnish officer escort, unless otherwise arranged; i.e., educators may be escorted by staff of the Education Department, etc. Such tours begin and end in the Warden's office, with an interview with the Warden or the Associate Warden, Administration, if possible.

B. Citizen participation in the institutional program:

1. Trade Advisory Groups working with both staff and inmate committees.

2. Academic Advisory Committee (works with staff and inmate committee).

3. Citizen volunteers (working with Alcoholics Anonymous, Speakers Clubs, athletic events, and other inmate groups).

C. Exhibitions and displays (annual Art Show, exhibits at fairs, music festivals, etc.).

D. Publications and articles:

Employees are encouraged to submit factual articles for the Correctional Review, professional journals, trade publications, etc. Such articles must be cleared through the Warden's Office for submission to Central Office.

E. Speaking Engagements:

1. Employees, if invited, and with advance notification to their supervisors, can speak to groups on the operations of the institution and the Department of Corrections.

2. Such talks or speeches should be:

   a. Objective, informative and factual. Personal opinions should be clearly identified as such.

   b. Non-partisan in controversial areas, should these arise during discussions.

/s/ L. S. Nelson, Warden
L. S. Nelson, Warden
SQ 10 #300 Dec. 27, 1966
Revised Feb. 15, 1972

CALIFORNIA STATE PRISON
SAN QUENTIN

November 15, 1971

Visiting Privileges

1. Receiving visits is a privilege, not a right and is subject to restriction or forfeiture if any of the following rules are violated.
2. Inmates may receive visits from ten (10) approved persons, who must be members of the family or friends of long standing. Two (2) of the ten (10) visitors will be allowed four (4) visits per month and the others, one (1) visit per month. The inmate will make this designation in writing to the Mail and Visiting Lieutenant. No person under eighteen (18) years of age may visit unless he/she is a member of the inmate's immediate family or unless accompanied by an approved visitor of the inmate who is over eighteen years of age. The visiting period will be one (1) hour in duration.
3. No one may visit unless already approved and on the visiting card. Some exceptions will be made for members of the immediate family if time permits.
4. Inmates who wish to place new visitors on their visiting card will send a completed CDC-105 form in a letter to the prospective visitor and the mail room will remove the 105 and substitute a blank CDC-106. On completion of the 106 the prospective visitor should mail it with a letter to the

inmate. The mail room staff will remove the completed 106 and forward it to the mail and visiting Lieutenant for approval. If facts don't agree, th visiting will be denied and the parties so notified. In some cases where there is doubt clarification will be requested.

5. No more than four (4) people will be allowed on the grounds to visit an inmate at one time. If there are more than four (4) in the party, the visiting hour must be divided among them.
6. Inmates may receive visits from prospective employers with the permission of the Warden or his authorized representative if the visitors are not on the approved list.
7. Visits from former inmates of any penal institutions or from persons involved in or convicted of any type of narcotics offense are prohibited, except by special permission of the Warden. A visitor who is on probation or parole must also have the permission of his supervisor to visit.
8. No male visitors wearing black or blue jeans will be permitted to visit.
9. Visitors are not permitted to leave money or any other articles at the institution for an inmate nor are they allowed to take anything from an inmate. Money must be sent in through the mail by Post Office Money and must be made payable to the Department of Corrections and must indicate the register number and name of the inmate for whom intended.

10. Visiting Hours: Monday, Thursday, Friday:
8:00 a.m. to 3:00 p.m.
Saturday, Sunday & Holiday:
8:00 a.m. to 2:00 p.m.

No Visiting on Tuesday and Wednesday

11. No visits are permitted on New Year's Day because of special activities. On certain days, such as Good Friday and the days preceding Christmas and New Year's Day, the visiting room will close one (1) hour early (on week days). In the event the institution should be in a state of unrest, visiting privileges are subject to cancellation.

12. Anyone entering the institution grounds is subject to being checked through the metal detector, and whenever deemed necessary the Warden or his authorized representative may order the searching of anyone who enters the institution grounds, and persons refusing such search will be denied entrance.

13. All persons entering the institution grounds will carry valid identification in their possession. Example: A valid California State Department of Motor Vehicles Identification Card, or a Driver's License. Also fingerprinting may be requested. If a person does not possess valid identification, or if he/she refuses to be fingerprinted, he/she will be denied entrance. Out of state visitors will have their identification checked by the Mail and Visiting Lt.

14. Bringing firearms, explosives, alcoholic beverages, benzedrine or drugs on the prison grounds con-

stitutes a felony. Visitors should be sure they do not possess any of these when entering.

15. Visitors will not be passed to the Warden's Office without prior clearance from that office. They will pass through the metal detector before being passed to the Warden's Office.

16. Visitors will not carry cameras, tape recorders, purses, bags, briefcases, or similar objects onto the prison grounds. They may take money, identification, loose cigarettes and necessary personal medication. All items carried by the visitor will be shown to the Officer at the metal detector for his inspection. If the items are difficult to search or if they fail to pass the metal detector, the visitor will be instructed to remove them from the grounds. Visitors should also avoid wearing articles of clothing or jewelry that contain metal.

17. No person will be permitted to visit with more than one (1) inmate of the California Department of Corrections unless said person is a member of the immediate family of both inmates.

18. Inmates in Segregation, Isolation, Adjustment Center or on hospital status will be allowed to receive one (1) visit per week from all sources, exclusive of Attorneys and investigators. Inmates on Isolation status will be limited to a one-half (½) hour visiting period. Exceptions will be made with the approval of the Mail and Visiting Lieutenant.

19. A member of the bar will be permitted to interview an inmate client with the consent of the

inmate, during normal visiting hours, subject to institutional regulations. Recording of interviews by tape recorders or other voice recording equipment will not be permitted, nor will cameras be allowed. Investigators for an Attorney of Record will be confined to not more than two (2). Such investigators will be either a member of the Bar or a California State Licensed Investigator. Designation shall be in writing.

20. Press and other media interviews with specific individual inmates will not be permitted.

[Declaration of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed April 27, 1972]

[Caption Omitted in Printing]

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS COMPLAINT

I

The motion for preliminary injunction should be denied because the relief which it seeks preliminarily is the same equitable relief which is sought by way of a permanent injunction.

> "It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the *status quo ante litem* pending a determination of the action on the merits. The hearing is not to be transformed into a trial of the merits of the action upon affidavits, and it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial. This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it." *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-09 (9th Cir. 1963).

The relief here sought by plaintiffs, like that erroneously granted in the foregoing case, would not preserve the status quo, but completely change it. For that reason, *inter alia*, we submit that such relief may not properly be granted by way of preliminary injunction.

II

Plaintiffs will doubtless place heavy reliance on the slip opinion in the very recent case of *Washington Post Co. v. Kleindienst*, No. 467-72 (D.D.C. 1972), wherein Judge Gesell granted an injunction against enforcement of federal prison rules similar to those at issue here. This is the first and only case from any jurisdiction holding that there is any federal right whatever to interviews between media representatives and prisoners. It contrasts sharply with the decisions of other federal court of equal dignity—*Seale v.*

Manson, 326 F.Supp. 1375 (D. Conn. 1971) and *Smith v. Bounds,* No. 2914 Civil (E.D.N.C. 1972). By no stretch of the imagination can *Washington Post* be deemed binding upon this Court, which is obliged to give these three conflicting cases only such weight as their inherent persuasiveness may warrant.

We submit that *Smith* is highly persuasive. The court there noted, correctly, that there is no authority holding that the First Amendment confers any rights of physical contact between inmates and the media. It noted further that the granting or denial of such interviews was a matter of internal prison administration over which the court had no jurisdiction. It was pointed out that

> "If ever a matter was repleat [*sic*] with overtones of internal affairs and discipline, this one is. The potential harm in the area of smuggling contraband both in and out of the Prison, the apparent difficulties and headaches in arranging times and facilities for such interviews, the problems in assuring proper security for the visiting members of the press, and many other problems make it clear that North Carolina's adoption of a general rule against such interviews is justified." pp. 3-4.

The *Washington Post* case finds, without the support of either authority or reasoned analysis, the existence of a First Amendment right on the part of both inmates and the media which, it concludes, may be vindicated only by allowing them to meet for the purpose of interviews. In manufacturing such a First Amendment right out of whole cloth, Judge

Gesell purported to rely upon the celebrated dictum that "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Coffin v. Reichard,* 143 F.2d 443, 445 (9th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945). Assuming the general validity of this dictum, it does not aid plaintiffs. It will, we trust, not be disputed that one of the rights a prisoner loses is that of freedom of travel. What First Amendment rights he may possess are not subject to exercise by means of leaving the prison and meeting the press. And we had thought it equally beyond dispute that there is no right of public access to prisons. Any access of the public to prisons in general or to particular inmates is at the sufference of the prison authorities. *Cf. Labat v. McKeithen,* 371 F.2d 757 (5th Cir. 1966). Authorities commonly allow access by relatives, spiritual advisors, and others, but as a matter of grace, not constitutional mandate. The control or, if need be, denial of access to prisons is a necessary concomitant of a warden's power and duty to maintain the security of the institution under his charge. If the public as a whole has no right of access to penal institutions, we are at a loss to see how such a right of access may be found on the part of the esteemed members of the Fourth Estate, who, in modern society, have a legal status no greater than or no different from that of any ordinary citizen. Any citizen may exercise his First Amendment right to write and publish; the fact that he may do so regularly or professionally does not give him a con-

stitutional right of news gathering superior to that of the ordinary private citizen.

At any rate, *Washington Post* is distinguishable. The Court there relies, at least in part, upon what it characterizes as an "overriding factor": "The great bulk of federal prisoners, perhaps as many as ninety percent, are incarcerated for non-violent crimes." Slip opinion, p. 7. Rather the opposite is true in California. The prisons of this state are rapidly decreasing in population, because of expanded community-treatment (jail, probation, and parole) programs. Because violent inmates are generally ineligible for these non-prison programs, inmates who are prone to violence or incarcerated for violent crimes represent the majority, and an increasingly large percentage, of all California prison inmates. Clearly then, some of the considerations relied upon by Judge Gesell are not present in the instant case.

We submit that, in light of the authorities cited herein and in the two previous memoranda we have filed, there is no federal right of interviews between California prison inmates and the press, and that the complaint should therefore be dismissed.

III

Although the question of abstention has not heretofore been raised by defendants, we seek leave of the Court to raise it now.

As the Court is aware, issues similar to those now before this Court are pending before the California Court of Appeal in *Yarish, et al. v. Nelson,* 1 Civ. No. 30188. In *Yarish v. Nelson,* No. C-71 1866 SW, this Court, in its order of November 18, 1971, dismissed without prejudice a complaint challenging the rules challenged in the instant proceeding, because of the pendency of the state case. We urge the Court to do the same thing here.

Although exhaustion of state remedies is not a prerequisite for the bringing of a civil rights action in federal court, considerations of comity and federalism require, or at least permit, a federal court to decline jurisdiction of a claim pending before a state court. *Cf. Younger v. Harris,* 401 U.S. 37 (1971). Only the most compelling and urgent considerations would justify the damage to federalism engendered by federal preemption of an issue currently pending before a state court. Whether to exercise the extraordinary power of mandatory injunction is discretionary, and we submit that in the circumstances of the instant case, that discretion should be exercised, as it was in *Yarish,* in favor of abstention.

We originally failed to raise abstention because of lack of identity of the parties in this and the state case. On further reflection, however, we have concluded that this lack of identity poses no barrier to invocation of the abstention doctrine. There is, of course, one common defendant, L. S. Nelson, in each action. More importantly, the actions are essentially the same, despite the lack of identity of plaintiffs,

since the issue is the same; whether the Department of Corrections regulations governing prison interviews are valid. And there is no dearth of available plaintiffs willing to assert exactly the same claims. Not to abstain here would permit circumvention of the abstention doctrine, since one group of plaintiffs could proceed in state courts and another in the federal courts, giving essentially the same class of persons two contemporaneous avenues for litigating the same issues—and two shots at the same result.

Abstention would be particularly appropriate in the instant case, since it was brought as a class action on behalf of all San Quentin prisoners and all media persons affected by the rules in question—a class including the individual plaintiff in *Yarish*. Although this Court has not yet determined whether this action shall be maintained as a class action, it would seem that plaintiffs, who are willing to submit it as such, should be bound by, and subject to the same abstention rules as, the member of their class who first brought litigation raising the same issue in this Court.

We therefore submit that this Court should defer decision in this matter pending resolution of the issues in the courts of California.

Conclusion

For the foregoing reasons, and others previously presented to this Court, defendants respectfully submit that plaintiffs' motion for preliminary injunction be denied and the complaint dismissed, or that de-

cision be deferred pending determination of the pending state-court appeal.

Dated: April 27, 1972

Evelle J. Younger, Attorney General
Herbert L. Ashby, Chief Assistant
Attorney General-Criminal Div.
Doris H. Maier, Assistant Attorney
General-Writs Section
Karl S. Mayer
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Atorneys for Defendants

GRN:jkh
SF CR
019920

[Declaration of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed May 2, 1972]

[Caption Omitted in Printing]

DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The function of this document is solely to respond to plaintiffs' memorandum filed April 27, 1972. It will be very brief, as most of plaintiffs' arguments are fully answered by our memorandum filed the same date.

Although it hardly seems necessary to note, we did not intend to characterize plaintiffs' complaint as asserting a right on the part of news media to interview nonconsenting inmates. We do think it fair, however, to characterize the complaint as asserting a right on the part of news media to interview any consenting inmate, and a concomitant right on the part of inmates to be interviewed by consenting newsmen, without regard to the interests of prison officials in the security of the institutions, and the men in them, for which they are responsible.

Plaintiffs' demand for a preliminary injunction is particularly ludicrous in view of the breadth of the injunction they seek and their own assertion that the complaint may not be dismissed on motion because there has been no examination of "the political and sociological structure of the prison population" with a view to proving "the causal connection between an

inmate becoming a leader because of his press access." Plaintiffs' memorandum, p. 5. We submit that plaintiffs' apparent concession that our position may be valid if backed up by evidence is fatally inconsistent with their contemporaneous insistence on issuance of a preliminary injunction, drastically altering, rather than preserving, the status quo, without the production or offer of evidence.

Plaintiffs accuse us of misstating the applicable law regarding First Amendment rights of prisoners by stating that these rights are clearly subject to limitation in the light of reasonable state interests. Plaintiffs assert that we must demonstrate a "compelling state interest" and imminent danger of its breach; "reasonable limitations are not sufficient where First Amendment rights are at stake." Plaintiffs' memorandum, p. 4. Rather, it is plaintiffs who misstate the law, and we who state it accurately. It is true that reasonable limitations may not suffice when the First Amendment rights of free citizens are threatened with infringement. But plaintiffs' own authorities show that the rights of prisoners are narrower and capable of restriction upon a lesser showing. For example, *Nolan v. Fitzpatrick,* 451 F.2d 545, 548 (1st Cir. 1971), speaks of restrictions which further "an important or substantial governmental interest." And *Carothers v. Follette,* 314 F.Supp. 1014 (S.D.N.Y. 1970), would have upheld actions which were "reasonably and necessarily related to prison security or the prisoner's rehabilitation." We submit that the court in *Carothers* adopted the correct view when it concluded that "if the state had given some explanation . . . that indicated the action was reasonably and

necessarily related to prison security or the prisoner's rehabilitation, we would be reluctant to interfere with its internal administration and regulations." *Id.* at 1024. We have done more than "indicate" the reasonable and necessary relationship between the rules in question and prison security, and submit that this Court should give the deference indicated in *Carothers* to the experienced judgment of the Director of Corrections. Reasonableness is the test, and we have met it.

Conclusion

For the foregoing reasons, and those previously set forth, we respectfully submit that the motion for preliminary injunction should be denied and the complaint dismissed.

Dated: May 2, 1972

Evelle J. Younger, Attorney General
Herbert L. Ashby, Chief Assistant
Attorney General—
Criminal Division
Doris H. Maier, Assistant Attorney
General—Writs Section
John T. Murphy
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Attorneys for Defendants

GRN:jkh
SF CR
019920

[Declaration of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed Oct. 4, 1972]

[Caption Omitted in Printing]

NOTICE OF MOTION AND MOTION TO VACATE JUDGMENT AND ORDER; REQUEST FOR ORDER SHORTENING TIME; REQUEST FOR STAY OF INJUNCTION PENDING HEARING

To: Richard Doctoroff and Patti Roberts, Counsel for Plaintiffs:

Please Take Notice that defendants will move this Court, on the date and time specified in the attached Order Shortening Time, in the courtroom of the Honorable Spencer Williams, United States District Judge, at the United States Court House, 450 Golden Gate Avenue, San Francisco, California 94102, for an order vacating the Judgment and Order of this Court, filed September 29, 1972. Defendants herewith request an order shortening time and a stay of this Court's Judgment and Order pending hearing on said motion.

This motion and these requests will be based upon all the records and files in the above entitled matter,

as well as on the memorandum of points and authorities and proposed orders attached hereto.

Dated: October 3, 1972

Evelle J. Younger, Attorney General
Edward A. Hinz, Jr., Chief Assistant Attorney General—Criminal Division
Doris H. Maier, Assistant Attorney General—Writs Section
John T. Murphy
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Attorneys for Defendants

GRN:bg
SF CR
019920

Points and Authorities

On September 29, 1972, this Court issued a judgment and order declaring California Department of Corrections Administrative Manual Paragraph 415.071 unconstitutional, enjoining its enforcement, and requiring defendants to submit, within 90 days, a draft order on the subject of inmate-media interviews, consistent with the Court's opinion.

Defendants respectfully move this Court to vacate the judgment and order, as it appears that a single United States District Judge lacks jurisdiction to enter any order enjoining the enforcement of this or any other regulation of the Director of Corrections, having statewide applicability.

It is settled law that a regulation of the California Director of Corrections, having statewide applicability, is treated as a state statute for purposes of determining the applicability of 28 U.S.C. § 2281 (the three-judge court statute). Accordingly, only a three-judge district court has jurisdiction to enjoin the enforcement of such a regulation. *Gilmore v. Lynch,* 400 F.2d 228 (9th Cir. 1968), *cert. denied,* 393 U.S. 1092 (1969). *See also Younger v. Gilmore,* 404 U.S. 15 (1971), holding that the Supreme Court had jurisdiction to hear an appeal from the three-judge district court convened pursuant to *Gilmore v. Lynch, supra,* and thus inferentially approving that decision. Both *Gilmore* and the instant case involved Administrative Manual provisions of statewide applicability. It is therefore clear that only a three-judge district court would have jurisdiction to enjoin their enforcement.

Defendants have at all times believed and maintained, in our pleadings and proposed orders, that the complaint failed to raise a substantial federal question. A single district judge has jurisdiction to dismiss a complaint which does not raise a substantial federal question, even if all the other requirements for a three-judge district court are met. *California Water Service Co. v. City of Redding,* 304 U.S. 252 (1938); *Ex parte Poresky,* 290 U.S. 30 (1933). Consequently, we did not earlier plead the requirement of a three-judge district court. Our failure to do so does not, of course, constitute a waiver of the requirements of 28 U.S.C. § 2281, since those requirements are jurisdictional, and even a stipulation of the parties will not confer jurisdiction

upon a single judge to hear a complaint which must be determined by a court of three judges. *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10 (1930); *Riss & Co. v. Hoch*, 99 F.2d 553 (10th Cir. 1938).

Since this Court did not concur with our view that the complaint failed to raise a substantial federal question, a three-judge court should have been convened.

Under our interpretation of the Judgment and Order, defendants have 90 days to submit new regulations governing inmate interviews to this Court, and in the meantime are not obliged to allow inmate interviews. However, we recognize that the Order is susceptible of the interpretation that defendants must immediately allow inmate interviews to all comers, pending submission and approval of new regulations. If the latter interpretation reflects the intent of the Court, we request that the Order be stayed pending hearing on the motion to vacate. Since the Judgment and Order were entered without jurisdiction, we submit that the stay should issue. We also request an order shortening time for hearing on the motion, so that defendants will not be impaired in performance of their duty to maintain prison security, pending hearing on the motion.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Court was without jurisdiction to enter the Judgment and Order filed September 29, 1972. Defendants therefore move that the Order be

vacated and suggest that this Court request the Chief Judge of this Circuit to convene a three-judge district Court.

Dated: October 3, 1972

Evelle J. Younger, Attorney General
Edward A. Hinz, Jr., Chief Assistant Attorney General—Criminal Division
Doris H. Maier, Assistant Attorney General—Writs Section
John T. Murphy
Deputy Attorney General

/s/ George R. Nock
George R. Nock
Deputy Attorney General
Attorneys for Defendants

GRN:bg
SF CR
019920

United States District Court
Northern District of California

[Caption Omitted in Printing]

CERTIFICATE OF COUNSEL IN SUPPORT OF REQUEST FOR ORDER SHORTENING TIME

George R. Nock, Deputy Attorney General of the State of California, certifies to the following:

I am counsel for defendants in the above-entitled matter. I am informed and believe that if it is the

intent of this Court that the Judgment and Order entered on September 29, 1972, requires defendants to allow interviews between the media and inmates under the control of defendants, said defendants will be impaired in the performance of their duties to maintain prison security. I therefore request that defendants' motion to vacate be heard as soon as possible, and that time for hearing therefore be shortened.

I have conversed this day by telephone with Richard Doctoroff, Esq., counsel for plaintiffs, and have been informed by him that he will be unable to appear at such a hearing at any time during the balance of this week, but that he could appear during the week of October 10, 1972. It is my belief that Mr. Doctoroff would stipulate to a hearing date during the week of October 10, 1972. I therefore request that the hearing be set for that week.

Dated: October 3, 1972

/s/ George R. Nock
George R. Nock

[Proposed Order and Declaration of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed Nov. 13, 1972]

[Caption Omitted in Printing]

MOTION FOR AN ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT

Plaintiffs in the above entitled action move this Court for an order directed at Defendants to show cause why they should not be punished for contempt of this court upon the grounds set forth in the affidavit of Richard M. Doctoroff, the order to show cause, and the contempt order all attached hereto, and made a part hereof.

Richard M. Doctoroff
Attorney for Plaintiffs

November 13, 1972

United States District Court
Northern District of California

[Caption Omitted in Printing]

ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT

Good cause appearing, It Is Hereby Ordered that Raymond K. Procunier, Louis S. Nelson, James W. L. Park and Joseph O'Brien be and appear in their own proper persons before this Court in the courtroom of the Honorable Spencer Williams, United States District Judge, at the United States Court House, 450 Golden Gate Avenue, San Francisco, California at

..... on the ..... day of November 1972, or as soon thereafter as counsel can be heard, to show cause, if any they have, why they and each of them should not be punished for contempt of court for violating and disobeying the orders of this Court signed September 28, 1972 and October 31, 1972, by refusing to permit named plaintiff prisoners and media to interview at San Quentin Prison, by refusing permission to other prisoners and media from interviewing at prisons of the California Department of Corrections, and by publishing regulations and rules that are contradictory and violative of the orders and opinions of this Court.

It is further Ordered that service of this order to show cause may be made on or before the ..... day of November 1972, by serving the above mentioned defendants herein or their attorneys copies of this order to show cause together with a copy of the affidavit in support thereof attached thereto.

Dated: November ....., 1972

.....

United States District Judge

AFFIDAVIT OF RICHARD M. DOCTOROFF*

State of California
City and County of San Francisco } ss.

Richard M. Doctoroff, being duly sworn, deposes and says:

1. I am the attorney for plaintiffs in the above entitled action.

2. On or about September 28, 1972 this Court rendered a judgement permanently enjoining enforcement of Section 415.071 of the California Department of Corrections Administrative Manual which prohibited interviews between prisoners and media representatives. At the same time the Court entered a declaratory judgement declaring said regulation to be invalid as a violation of the First Amentdment, and the Court ordered that the Defendants submit a proposed rule consistent with the opinion of the Court within 90 days.

3. On October 2, 1972 Plaintiff Eve Pell telephoned San Quentin Prison soon after she learned of the favorable order in order to arrange to interview Plaintiff John Larry Spain. Officials at San Quentin indicated that they would not allow the interview to take place despite the existance of the Court's order.

4. I then contacted Mr. George Nock, attorney for the Defendants to indicate the problem that Ms. Pell was having arranging the interview. He told me that he was planning to move for an order vacating the judgement on jurisdictional grounds and he would

*Misspellings in original.

attempt to have the judgement stayed until a hearing could be held on defendants' motion to vacate. He indicated that Defendants would not comply with the order at least until the request for a stay was ruled upon.

5. On October 4, 1972 an order shortening time was signed by the Court setting the time for hearing on the defendants' motion to vacate on October 11, 1972. At the same time the Court refused to sign the Order Staying the Injunction, indicating to plaintiffs and their counsel that the order was in effect and should be obeyed.

6. Between the time when the case was set for hearing on October 4, 1972 and the hearing that took on October 11, 1972 I made numerous requests to Mr. Nock to arrange for at least the named plaintiffs to be permitted to interview at San Quentin. He continually repeated that the Department was working on interim regulations and they would be ready within "a day or two", and visits could commence when they were prepared. No visits had taken place when the motion to vacate was heard on October 11, 1972 nor have they at this date more than a month later.

7. During the period after the Judgement was signed on September 28 and the hearing on October 11, I received numerous complaints from media people who called San Quentin Prison to arrange for interviews and prison officials refused even to acknowledge the existance of the Courts order. Alice Yarish of the Pacific Sun in San Raphael and Mark Schwartz of KPFA radio in Berkeley were press people who

attempted repeated to get into San Quentin to see prisoners and they were turned away during this period.

8. At the hearing on October 11, 1972 when the Court indicated that he would replace the order granting a permanent injunction with a temporary restraining order, counsel for the defendants, Mr. Nock represented to the Court that officials of the Department of Corrections were meeting that very day to formulate interim regulations that complied with the earlier opinion of the Court. Mr. Nock indicated that the regulation would be sent to the various prisons by the end of that same day and interviews would be permitted almost immediately. The interim regulations were not finally received by counsel for plaintiffs until November 10, 1972 one month later. During the interim there was no compliance with the order of the court nor is there yet compliance.

9. On October 31, 1972 this Court issued the temporary restraining order that was requested at the October 11 hearing thereby replacing replacing the permanent injunction that had been in force until that time. That restraining order was to be effective "upon receipt". When I received the Order of October 31, from the Court, I immediately telephoned Mr. Nock to inform him of the new order and again request access for plaintiffs, on or about November 2, 1972. Mr. Nock again represented that the new rules were forthcoming and access would be very soon.

10. Complaints from media representatives continued to be received by me and my office indicating that the prison still refused to acknowledge the very

existance of the Courts' order. These included additional complaints from the aforementioned Alice Yarish and Mark Schwartz.

11. On November 9, 1972 I visited prisoners at San Quentin Prison and upon leaving the prison I requested a copy of the new Visiting Regulations which had been prepared (See Attachement). Paragraph 17 of those regulations dated November 1, 1972 seems to be in flagrant violation to all orders of this Court entered in this case and contradictory to all representations made by defendants through their counsel to the Court and plaintiff counsel. This item is a verbatim repeat of Department of Corrections Administrative Manual Section 415.071 which has been enjoined by order of this Court. Even if this rule of November 1, 1972 is superceded by other departmental regulations the flagrant disregard of the Courts order in this specific instance should be punished and defendants should be ordered to notify all persons who may have received the illegal notice of November 1, 1972 that media visits are permitted by order of this Court. Unless such notification is ordered and the Regulations of November 1 are restrained from further circulation in their existing form visits between press and prisoners at San Quentin will be greatly deterred.

12. After I read the November 1 San Quentin regulations I spoke to Mr. Nock on the telephone on November 9 indicating my anger at the defendants for breeching any good faith that may have existed by framing such a rule. Mr. Nock stated that he was meeting with Mr. Procunier, defendant Director of

Corrections, to discuss the problem and that he would telephone me Friday November 10, 1972 to indicate the results of his conference. No phone call was received from Mr. Nock or any other person representing defendants on that day. At the same time Mr. Nock stated that the interim press regulation prepared by the Department of Corrections had been mailed to me that very day; he also expressed the belief that plaintiffs probably would not be satisfied with the new rules since they were somewhat restrictivve. At the conclusion of that telephne call I indicated to Mr. Nock that in light of the fact that none of the plaintiffs had been granted the relief ordered by the Court and even he believed that the new rules would not be acceptable to plaintiffs, plaintiffs would probably begin contempt proceedings the beginning of the week of the 13th November.

13. On November 10, 1972, I finally received a copy of the interim rules regarding media interviews, entitled—Administrative Bulletin No. 72/40 (See attachment), dated November 6, 1972. On their face the regulations limits media visits to such an extent that five of the named plaintiffs in this action would not be allowed to have press visits if the new rules were allowed to be enforced. Plaintiff Eve Pell is a free lance writer and editor; plaintiff Betty Segal reports for a monthly newspaper. Neither of them comes within the definition of "News Media Representative . . . a full-time reporter for recognized and regularly published news magazines such as *Time* and *Newsweek*, general coverage daily newspapers (published at least five time a week), and daily news

programs of radio and televisions." That paragraph would also prevent plaintiff Booker T. Hillery from speaking to agents of publishers for the purpose of manuscript publication, and prevent plaintiffs Bobby Bly and John Larry Spain from having interviews with Betty Segal and Eve Pell respectively. The blanket proscription against media interviews with prisoners in isolation or segregation would bar plaintiff Spain from having media interviews with any press. Defendant Procunier who issued the new regulations was fully on notice of the status of all plaintiffs of this lawsuit. For him and other defendants to issue regulations that would be so limiting so as to exclude named plaintiffs appears to be in acting in completely bad faith and in contempt of the orders of this Court.

14. Besides excluding the named plaintiffs the new regulations are defective in several other respects:

a/ language stating "Interviews with specific inmates may be prohibited at those times in which such interviews, in the judgement of the warden or superintendant, would jeopardize the current safety of the institution, and at those times in which such interviews would be detrimental to the welfare and best interests of the inmate," is so vague as to undercut the entire value of the opinion of the court and gives the wardens carte blanche power to subvert any of the other language of the new regulations that seem to allow media visits.

b/ Special classification for prisoners received from court or returned on parole appears to be discriminatory and violative of the equal protection

clause unless the defendants can sustain the burden of showing a compelling state interest for this extraordinary categorization. I can conceive of of no more compelling reasons for disallowing these prisoners from having press visits than any other prisoner, and because of their status of having only recently arrived at prison their stories may have even more newsworthiness than the average prisoner in light of their recent court experiences.

c/ limitations regarding consent of attorneys, co-defendants, and criminal courts while ostensibly for the protection of the prisoners can and will be used by the prison officials to obstruct media interviews. Had this Court deemed it necessary to limit media interviews in this manner it had the power to do exactly that, but it declined to do so and left the element of consent to the prisoner him or herself.

d/ Limitation of one visit with media for any six month period for a specific prisoner except with special permission appears to totally shift the proper burden regarding time and space requirements at the expense of a prisoners First Amendment rights. Until the defendants are able to show that a prisoners media visits interferes with a compelling state interest, such an arbitrary limitation should not be allowed to exist.

e/ Language calling for the possibility of imposition of "cost of any added supervision or security arrangements which may be deemed necessary in connection with an interview," can be implemented by prison officials to essentially tax the new gathering

activities of the press and corresponding limit the freedom of speech of prisoners. It is hard to imagine a more extreme situation as one in which prisoners and media have to pay for guards so that they can excercise their First Amendment rights.

f/ Although media interviews with psychotic prisoners is unlikely to be a normal occurance, the blanket proscription against such visits should be voided since defendants have hardly evidenced why psychotics visiting with media would be inconsistant "with prison safety and discipline," to use the words of the order of October 31, 1972. There are many types of psychosis and until there is a showing in a specific case that such a visit would create a problem, psychotics too should have equal access to be heard. The media do not need prison officials to act as guardians and determine who is sane enough to be visited, and are capable of making their own determination.

15. Plaintiffs and their counsel have been extremely patient with defendants and their counsel and believed them to be operating in an atmosphere of good faith. In view of the fact the original judgemeant in this case was rendered over six weeks ago, we believe we believe that we have shown extreme reluctance in utilizing the extraordinary contempt power of this Court. We can be patient no longer and seek assistance of the Court to have effective compliance with its orders.

Richard M. Doctoroff

[Jurat Omitted in Printing]

San Quentin
November 1, 1972
[Attachment One]

Visiting Privileges

1. Receiving visits is a privilege and is subject to restriction: (1) if the safety and order of the institution is threatened and (2) if the relationship may be harmful to the inmate, the applicant or any other person.

2. Visiting Hours: Monday, Thursday, Friday 8:00 A.M. to 3:00 P.M. Saturday, Sunday, Holidays 8:00 A.M. to 2:00 P.M.

   No Visiting On Tuesday and Wednesday

   No visits are permitted on New Year's Day because of special activities. On certain days, such as Good Friday and the days preceding Christmas and New Year's Day, the Visiting Room will close one (1) hour early (on week-days). In the event the institution should be in a state of unrest, visiting privileges are subject to cancellation.

3. Inmates may receive visits from 10 approved persons. Exceptions to this procedure can be considered for programs or persons approved by the Administration. Two (2) of the ten (10) visitors will be allowed four (4) visits per month and the others, one (1) visit per month. The inmate will make this designation in writing to the Mail and Visiting Lieutenant. No person under eighteen

(18) years of age may visit unless he/she is a member of the inmate's immediate family, or unless accompanied by an approved visitor of the inmate who is over eighteen (18) years of age. The visiting period will be one (1) hour in duration. Any extension or limitation will be made by the Mail and Visiting Lieutenant on facts presented to him.

4. Inmates who wish to place visitors on their visiting card will send a completed CDC-105 form in a letter to the prospective visitor, and the mail room will remove the CDC-105 and substitute a blank CDC-106. On completion of the CDC-106, the prospective visitor should mail it with a letter to the inmate. The mail room staff will remove the completed CDC-106 and forward it to the Mail and Visiting Lieutenant for processing. If facts don't agree, the parties will be notified and clarification will be requested before visiting will be permitted.

5. Four (4) people will be allowed on the grounds to visit an inmate at one time. If there are more than four (4) in the party, the visiting hour must be divided among them.

6. Visits from former inmates of any penal institutions or from persons involved in or convicted of any type of narcotics offense are prohibited, except by special permission of the Warden. A visitor who is on probation or parole must also have the permission of his parole or probation supervisor to visit.

7. No male visitor wearing black or blue jeans will be permitted to visit.

8. Visitors are not permitted to leave money or any other articles at the institution for an inmate, nor are they allowed to take anything from the inmate.

   Money must be sent in through the mail, by Post Office money orders; must be made payable to the Department of Corrections; and must indicate the register number and name of the inmate for whom intended.

9. Anyone entering the Institution grounds is subject to being checked through the metal detector, and whenever deemed necessary, the Warden or his authorized representative may order the searching of anyone who enters the Institution grounds. Persons refusing such search will be denied entrance. Fingerprinting or photographs may also be requested as a further means of identification. If a person refuses to be fingerprinted, admission will be denied.

10. All persons entering the Institution grounds will carry valid identification in their possession. Example: California State Department of Motor Vehicles identification card or a Drivers License. If a person does not possess valid identification, he/she will be denied entrance. Out-of-state visitors will have their identification carefully checked.

11. Bringing firearms, explosives, alcoholic beverages, benzedrine or drugs on the prison grounds consti-

tutes a felony. Visitors must be sure they do not possess any of these when entering.

12. Visitors will not be passed to the Warden's Office without prior clearance from that office. They will pass through the metal detector before being passed to the Warden's Office.

13. Visitors will not carry cameras, tape recorders, purses, bags, briefcases, or similar objects onto the prison grounds. They may take money, identification, loose cigarettes, and necessary personal medication. All items carried by the visitor will be shown to the officer at the metal detector for his inspection. If the items are difficult to search, or if they fail to pass the metal detector, the visitor will be instructed to remove them from the grounds. Visitors should also avoid wearing articles of clothing or jewelry that contain metal.

14. No person will be permitted to visit with more than one (1) inmate, unless said person is a member of the immediate family of both inmates.

15. Inmates in Segregation, Isolation, Adjustment Center or on hospital status will be allowed to receive one (1) visit per week from all sources, exclusive of attorneys and investigators. Inmates on Isolation status will be limited to a one-half (½) hour visiting period. Exceptions will be made with the approval of the Mail and Visiting Lieutenant.

16. A member of the Bar will be permitted to interview an inmate client with the consent of the in-

mate, during normal visiting hours, subject to institutional regulations. Tape recorders or other voice recording equipment or cameras will not be permitted. A cassette-type recorder will be furnished by the Institution. The attorney will supply the cassette. Investigators for an attorney of record will be confined to no more than two (2). Such investigators will be either a member of the Bar of California or a California State licensed investigator. Designation shall be in writing.

17. Press and other media interviews with specific individual inmates will not be permitted.

[Attachment Two]

State of California
Department of Corrections
Sacramento 95814

November 6, 1972

Administrative Bulletin No. 72/40

To: Wardens and Superintendents; Deputy Directors; and Staff Members

Subject: News Media Interviews with Specific Inmates

This temporary order covering news media interviews with specific inmates is issued under compulsion of federal court order and will remain in effect until cancelled or replaced by a permanent order.

News media representative is defined as a full-time reporter for recognized and regularly published news

magazines such as *Time* and *Newsweek,* general coverage daily newspapers (published at least five times a week), and daily news programs of radio and television stations.

Interviews with specific inmates are defined as interviews by news media representatives with inmates specified by name.

Administrative Manual Section 415.071 is temporarily amended as follows:

News media representatives may be permitted to interview a specific inmate if the inmate wishes it under following conditions:

Interviews with specific inmates may be prohibited at these times in which such interviews, in the judgment of the warden or superintendent, would jeopardize the current safety and good order of the institution, and at those times in which such interviews would be detrimental to the welfare and best interests of the inmate. Interviews with inmates who are psychiatrically diagnosed as psychotic are prohibited.

Interviews with specific inmates will not be permitted during times in which such inmates are in isolation or segregation, or for a reasonable time after they are received from court or returned from parole. If an inmate is awaiting trial, such interview may be permitted only (1) with consent of the inmate's attorney, (2) if the inmate has no attorney, with consent of the court, (3) if the inmate is a co-defendant, after notice to the co-defendants and their counsel of court, (4) if the court has imposed a gag rule in the case,

with specific approval of the court as expressed by minute order.

Interviews with a specific inmate will be permitted only once in any one month period for any individual inmate, unless otherwise approved by the Director.

Interviews must be approved by the warden or superintendent and be requested by one week in advance in writing. Interviews will be arranged to be conducted during regular institution hours if possible. All interviews will be conducted under such conditions as the institution head may deem appropriate, including restrictions as to time, place and length of interviews, size of film crew, and any other factors related to the interview. There will be no cameras or recording equipment used without the specific advance approval of the warden or superintendent. Plans for the use of electrical equipment will be submitted with the original request one week in advance. News media may be required to pay for the cost of any added supervision or security arrangements which may be deemed necessary in connection with an interview.

Please see that all personnel are informed of the contents of this bulletin.

/s/ R. K. Procunier
R. K. Procunier
Director of Corrections

United States District Court
Northern District of California

[Filed November 15, 1972]

[Caption Omitted in Printing]

AFFIDAVIT OF RICHARD M. DOCTOROFF IN FURTHER SUPPORT OF MOTION FOR AN ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT.

State of California
City and County of San Francisco—ss.

Richard M. Doctoroff, being duly sworn, deposes and says:

1. I am the attorney for plaintiffs in the above entitled action.

2. Prior to filing of the original complaint in this action plaintiff Booker T. Hillery requested the right to be interviewed by publishers of *Earth Magazine* when that request was denied the action was filed *in propria personem* because of defendants' refusal to fulfill his request and allow the interview to take place.

3. Prior to filing the amended complaint in this action each of the additional prisoner plaintiffs in this action made requests to be interviewed by the media plaintiffs in this action. When those requests were denied by the defendants, plaintiffs represented by counsel filed the amended so that the request for interview could be realized.

4. Since the amended complaint has been filed almost all negotiation involved with this action has

been accomplished through counsel and there has been virtually no contact between the plaintiffs and defendant regarding the matters concerned in this lawsuit.

5. Since the Court's orders of September 28, 1972 and October 31, 1972 I personally have been negotiating with Defendants' attorney, George Nock so that prisoner plaintiffs and media plaintiffs will be able to realize the interviews that they originally sought in the complaint, but this has achieved no results to this date and the prisoners requests to be interviewed by the media is still unfulfilled. Plaintiff prisoners requests for interviews with specified media persons must be considered to have been in effect from before the filing of this action and any renewal of these requests required by this Court should be considered to have been made by counsel in the course of negotiating the implementation of the orders of this Court.

6. Since this Court has entered orders on September 28, 1972 and October 31, 1972, Mark Schwartz, a fully credentialed reporter from radio station KPFA in Berkeley has received written request to visit four prisoners at San Quentin Prison and has been allowed to see none of them. Although Mr. Schwartz has letters requesting interviews with plaintiff, John Larry Spain, and prisoners Larry Justice, Luis Talamantez, and Robert Eikner, in a letter dated October 31, 1971 from defendant Warden Louis Nelson and in a phone conservation on November 10, 1972 with defendant Associate Warden James Park,

Mr. Schwartz was told that these prisoners did not have a right to be interviewed by media because they were in the Adjustment Center.

7. Unless this Court issues an order to show cause why defendants should not be held in contempt, the orders of this Court will be emasculated by the new Departmental regulations that would continue to prevent prisoner plaintiff from being able to speak to members of the press.

Richard M. Doctoroff

[Jurat Omitted in Printing]

In The United States District Court
For The Northern District of California

[Filed November 21, 1972]

[Caption Omitted in Printing]

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

To the Honorable Oliver D. Hamlin, Jr., United States Circuit Judge, and the Honorable William G. East and Spencer Williams, United States District Judges, and to Richard Doctoroff, Esq., and Patti Roberts, Counsel for Plaintiffs:

Defendants hereby move this Court for an order dissolving the temporary restraining order, issued by Judge Williams on November 1, 1972, which restrains the enforcement of California Department of Corrections Administrative Manual Paragraph 415.071.

Defendants urgently desire a ruling on this motion. Recognizing the difficulties inherent in assembling the three judges, defendants will waive any right to a hearing before the court assembled. If the Court desires or opposing counsel demands a hearing, defendants urge that it be held at the earliest possible time, and waive any time requirements for such a hearing.

This motion is based on all the records and files in this case, and upon the memorandum of points and authorities and proposed order attached hereto.

Dated, November 20, 1972.

Evelle J. Younger, Attorney General
Edward A. Hinz, Jr., Chief Assistant Attorney General—Criminal Division
Doris H. Maier, Assistant Attorney General—Writs Section
John T. Murphy
Deputy Attorney General
George R. Nock
Deputy Attorney General

GRN:bg
SF CR
019920

Points and Authorities

On November 8, 1971, plaintiff Hillery filed a complaint, in propria persona, seeking money damages for allegedly having been refused permission to receive a visit from editors of Earth Magazine, to whom plaintiff Hillery had allegedly submitted an article

for publication. Ine due course, counsel was appointed and on March 9, 1972, filed an amended complaint and motion for preliminary injunction. New plaintiffs and defendants were added in the amended complaint, and it was alleged that defendants, all officers of the California Department of Corrections, had refused to allow plaintiffs, prisoners and persons alleged to represent the media, to interview one another. Defendants moved to dismiss the complaint and opposed the motion for preliminary injunction, defending in part upon the basis that Administrative Manual Paragraph 415.071, which defendants argued to be constitutional, prohibited interviews between the media and specific inmates. This defense did not run to plaintiff Hillery; the refusal to extend visiting privileges to the editors of Earth Magazine was not based on Paragraph 415.071. Such a visit was not considered a media interview, but a special purpose visit, for which no showing of need was made.

The motions were heard and the matter submitted in May, 1972.

On September 29, 1972, Judge Williams filed an order granting a permanent injunction against the enforcement of Paragraph 415.071 and requiring defendants to submit within 90 days new regulations governing prisoner-media interviews.

On November 1, 1972, on motion of defendants, this order was vacated on jurisdictional grounds. Judge Williams notified the Chief Judge that the matter was one required to be heard and determined by a court of three judges. On the same date, Judge

Williams entered an order temporarily restraining the enforcement of Paragraph 415.071. It is this temporary restraining order which we now ask this Court to dissolve.

Following issuance of the permanent injunction on September 29, 1972, defendant R. K. Procunier, Director of Corrections of the State of California, began to prepare a set of emergency regulations governing inmate interviews with the news media, under compulsion of the permanent injunction. These regulations were published November 6, 1972. Their validity is now being questioned before Judge Williams. It is the position of defendants, however, that they are under no federal obligation to permit any interviews between inmates and news media personnel. The publication of the regulations, being under compulsion of court order, does not detract from this position.

I

An injunction against enforcement of United States Bureau of Prisons regulations indistinguishable from paragraph 415.071 having been stayed by the Supreme Court, the temporary restraining order should not have issued and should be dissolved.

In the case of *The Washington Post Co. v. Kleindienst,* No. 72-1362, United States District Court for the District of Columbia, plaintiffs sought injunctive relief against the enforcement of a regulation of the United States Bureau of Prisons which prohibited

interviews between members of the news media and individual inmates of the federal prisons. On April 11, 1972, the district court issued an order preliminarily enjoining the enforcement of the regulation. A copy of the opinion and order of the district court is a part of the file in the instant case, having been appended to Plaintiffs' "Supplemental Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Preliminary Injunction," filed April 27, 1972.

After both the district court and the Court of Appeals for the District of Columbia Circuit denied the Government's motions for a stay pending an appeal, the request was brought before the Supreme Court. On May 12, 1972, by a vote of six to three, the Supreme Court ordered the preliminary injunction stayed pending appeal. 406 U.S. 912. We are informed by counsel for the Bureau of Prisons that said stay remains in effect.

The order of the Supreme Court gives no reasons for issuance of the stay, and it would be presumptuous of us to suggest what those reasons might be. But the regulations involved in *The Washington Post Co.* are indistinguishable from those involved in the instant case and are identical in their effect. No reason has been advanced why the United States Bureau of Prisons should be free to enforce their regulations while the ultimate question of the validity of the regulations is litigated, while the Department of Corrections of the State of California is forbidden to

enforce functionally identical regulations prior to even a preliminary adjudication of their validity by a court of competent jurisdiction. We therefore submit that deference to the Supreme Court's order requires dissolution of the temporary restraining order issued herein.

II

The temporary restraining order should be dissolved because it radically alters the status quo, rather than preserving it.

It is axiomatic that the sole proper function of a temporary injunction is to preserve the *status quo ante litem,* and that it is improper to use such an order to alter the status quo. *King v. Saddleback Junior College District,* 425 F.2d 426 (9th Cir. 1970); *Washington Capitols Basketball Club, Inc. v. Barry,* 419 F.2d 472 (9th Cir. 1969); *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F.2d 804, 809 (9th Cir.), *cert. denied,* 375 U.S. 821 (1963); *Quon v. Stans,* 309 F. Supp. 604 (N.D. Cal. 1970). "The status quo is the last, uncontested status preceding the commencement of the controversy." *Washington Capitols Basketball Club, Inc. v. Barry, supra,* 419 F.2d at 476. This definition is clarified by examination of some of the other cited cases. In *King, supra,* plaintiffs were prospective students at a public college who were prevented from registering for classes because their hairstyles did not comport with the applicable college rules. A preliminary injunction was issued restraining defendants from enforcing these rules, thus allowing plaintiffs to register. Upon appeal by de-

fendants, it was held that the district court had abused its discretion in issuing the preliminary injunction, since the injunction altered, rather than preserved, the *status quo ante litem*. In *Quon, supra,* defendants had announced for some time their plans to do the acts complained of (conducting the United States census in a manner which plaintiffs contended violated the rights of Chinese-Americans), but had not yet implemented these plans. Temporary relief against such implementation was denied, the court holding that relief would "upset the situation as it has existed for some time, the last peaceable state of affairs prior to this controversy." 309 F.Supp. at 607.

Viewed in light of the above cases, the instant temporary restraining order was clearly improperly issued. Administrative Manual Paragraph 415.071 had been in force since August 23, 1971, nearly three months before the filing of the original complaint in this matter (which did not challenge this Paragraph) and nearly seven months before the filing of the first amended complaint. It was also in force more than fourteen months prior to the issuance of the temporary restraining order. By no stretch of the imagination could the controversy be deemed to have commenced prior to the filing of the original complaint. The "situation," which includes the existence and enforcement of Paragraph 415.071, had clearly existed for months before any controversy between the parties arose, and was thus "the last peaceable state of affairs prior to this controversy." *Quon, supra,* 309 F.Supp. at 607. The temporary restraining order

did not preserve the *status quo ante litem,* in which inmates could not have interviews with the media, but drastically altered it to require defendants, against their judgment, to permit such interviews. It is the ultimate twist of logic to argue, as plaintiffs have, that a temporary injunction merely restores the status quo.

The impropriety of the relief granted can be vividly demonstrated by comparison with a proper temporary restraining order. In *Gilmore v. Lynch,* Case 45878 in the files of this Court, defendants had issued a regulation requiring the removal of certain books from prison libraries, and the destruction of such books. A temporary restraining order quite properly issued to prevent such threatened removal and destruction pending adjudication of the validity of the regulation. The temporary restraining order was proper because it preserved the status quo and prevented threatened irreparable injury. The restraining order issued herein is improper because it radically alters the status quo and itself threatens irreparable injury. Defendant Procunier adopted the regulation in question herein because, in his judgment, it was necessary to the discipline and security of the institutions under his control. If this judgment is correct, the consequences of the restraining order can include any number of things, up to and including loss of life, which may be fairly characterized as "irreparable injury." We submit that an order so drastically altering, rather than preserving, the status quo may be properly issued, if at all, only by this three-

judge court itself, after thorough litigation of all the issues involved.

It has also been recognized that temporary injunctive relief should be denied where there is a serious dispute regarding the applicable law. *N. W. Controls, Inc. v. Outboard Marine Corporation,* 317 F.Supp. 698, 702 (D. Del. 1970). The existence of such a dispute herein is not difficult to establish. Apart from the now-vacated order issued by Judge Williams, only one case, *The Washington Post Co. v. Kleindienst, supra,* has held there is any federal right on the part of prison inmates to interviews with the news media. To the contrary are three cases from three different districts: *Seale v. Manson,* 326 F.Supp. 1375 (D. Conn. 1971); *Smith v. Bounds,* No. 2917 Civil (E.D.N.C. 1972); and *Seattle-Tacoma Newspaper Guild v. Daggett,* Civil No. 9557 (W.D. Wash. 1972), *appeal pending,* No. 73-2330 (9th Cir.). Further, the issuance of the stay by the Supreme Court in the *Washington Post* case may give some indication that a majority of that Court has not been convinced of the soundness of the opinion of the district court in that case. The foregoing cases clearly show the existence of a dispute concerning the applicable law sufficient to preclude the granting of temporary injunctive relief.

III

The temporary restraining order is not supported by a sufficient showing of irreparable injury

A temporary restraining order issued by a single judge pending the convening of a three-judge district

court must be supported by a finding, based on evidence, that irreparable injury will result if the order is not issued. 28 U.S.C. §2284(3). Such a finding was made in this case. We submit, however, that it was not based on substantial evidence.

The finding was based entirely on the affidavit of Richard Doctoroff, plaintiffs' attorney, the body of which reads, in its entirety, as follows:

> "Richard M. Doctoroff, being duly sworn, deposes and says:
>
> "That I am the attorney for prisoner plaintiffs in the above-entitled lawsuit. My clients have repeatedly attempted to communicate with different authorized members of the news media in order to exercise their first amendment rights and to effectively communicate information concerning their confinement in San Quentin State Prison.
>
> "Unless the temporary restraining order is issued prisoner plaintiffs' constitutional rights will continue to be stifled. Irreparable damage has already occurred in that Booker Hillery's attempts to be interviewed by a member of the staff of Earth magazine is now impossible, in that the magazine is no longer publishing. If a temporary restraining order is not issued other information that is desired to be communicated may also be lost to time and other circumstances."

Upon the basis of the foregoing affidavit, the court concluded that the affidavit "states that the regulation continues to remain in force, and has prevented Plaintiff Hillery from communicating with various

members of the news media." Close examination of the affidavit, however, reveals that it does not so state. It does not state that the regulation (Paragraph 415.071) remains in force, although we will stipulate that it did. The affidavit fails to state that this regulation has prevented plaintiff Hillery from communicating with various members of the news media. It states that Hillery had been prevented from being interviewed by a member of the staff of Earth Magazine, which is no longer publishing. In point of fact, any such prevention of an interview could not have taken place pursuant to Paragraph 415.071, as this provision is not interpreted as governing visits between an inmate author (the status claimed by plaintiff Hillery in his original complaint) and his publisher or prospective publisher, as such visits are not considered news media interviews. This fact is brought out in an affidavit of R. K. Procunier, to be filed in this matter within a few days.

The experience of plaintiff Hillery is used in the affidavit to illustrate possible "irreparable damage" in the form a failure of a magazine or newspaper which might have printed what some prisoner had to say. But there is no showing that any prisoner, including Hillery, presently desires to communicate any information to or through any publication which might be in danger of failure. The remainder of the affidavit, concerning the alleged repeated attempts of the affiant's clients to communicate with unspecified "authorized" members of the news media "in order to exercise their first amendment rights" is

too vague and insubstantial to be considered as evidence to support the issuance of a temporary restraining order. Moreover, there is no indication of what these people wish to communicate and why such communication could not be deferred until a final ruling on this matter by this Court. Furthermore, there is no allegation that any prisoner has been denied his right to correspond in writing with any member of the news media or any showing that plaintiffs or other inmates are unable "to effectively communicate information concerning their confinement in San Quentin State Prison" by such correspondence.

In sum, there has been no substantial showing of irreparable injury on the part of inmates by continued enforcement of the regulation in question. By contrast, the restraining order itself offers considerable potential for the sustaining of irreparable injury by defendants. Defendants, who are prison administrators of great experience, are charged with the legal responsibility of managing the prisons of California. They have done so according to their best judgment, formulated in light of their extensive experience. By requiring defendants to admit into the prisons and allow to perform certain acts there persons who, in defendants' judgment, should not be there or perform such acts, the restraining order trenches severely upon defendants' ability to discharge their legal obligations. If any of a number of possible consequences should ensue, ranging from minor disciplinary problems to prison riot and even murder, "irreparable injury" caused by the restraining order will surely

have been demonstrated. We submit that the possibility of such serious consequences of the order greatly outweighs any conceivable showing of "irreparable injury" to plaintiffs.

Conclusion

For the foregoing reasons, it is respectfully submitted that the temporary restraining order issued November 1, 1972, should be dissolved, pending further order of this Court.

Dated, November 20, 1972.

Evelle J. Younger, Attorney General
Edward A. Hinz, Jr., Chief Assistant
Attorney General—Criminal Division
Doris H. Maier, Assistant Attorney
General—Writs Section
John T. Murphy
Deputy Attorney General
George R. Nock
Deputy Attorney General
Attorneys for Defendants

GRN:bg
SF CR
019920

[Proposed Order and Declaration of Service Omitted in Printing]

In the United States District Court
For the Northern District of California

[Filed Nov. 22, 1972]

[Caption Omitted in Printing]

AFFIDAVIT OF R. K. PROCUNIER

R. K. Procunier, being first duly sworn, deposes and says:

I am Director of Corrections of the State of California, a position which I have occupied since 1967. I have been employed continuously since April 1948 in the corrections field. For approximately one year, during 1957-58, I was first Deputy Director, Personnel Management and Training, and then Director of Corrections, of the State of Utah. The remainder of my employment since 1948 has been with the Department of Corrections of the State of California. The positions I have held, both institutional and departmental, include correctional officer, sergeant, and lieutenant; Assistan Departmental Personnel Officer; Departmental Training Officer; Associate Superintendent of California Medical Facility; Superintendent for Inmate Classification for the Department; and Associate Superintendent and Superintendent of Deuel Vocational Institution. I held the last-named position immediately prior to my appointment as Director. The opinions and conclusions expressed in this affidavit are drawn from the knowledge and experience which I have acquired by virtue of holding the foregoing positions.

This affidavit is submitted in explanation and justification of those portions of Administrative Bulletin

No. 72/40 with which I understand plaintiffs have expressed dissatisfaction.

I

The definition of "news media representative" was formulated in lieu of any definition by the Court, in order to limit interview privileges to a reasonable number of legitimate, as opposed to self-proclaimed, representatives of the media. The definition corresponds generally to the definitions of news media representatives used by various private organizations and other governmental agencies for the purposes of granting or withholding press privileges. According to my information and belief, the correspondents' association in the State Capitol limits official recognition and privileges to "bona fide correspondents of reputable standing in their business who represent daily newspapers requiring a daily file of legislative news or who represent news associations requiring daily telegraphic reports or radio or television services on legislative news." The California Highway Patrol issues press identification cards to news reporters who are identified in formal written requests from media executives. Identification cards are not issued to free-lance writers and others not normally engaged in news reporting. The Los Angeles Police Department issues official identification cards to "actual news gathering representatives of daily newspapers or publications printed in Los Angeles, news services, or radio or television stations maintaining a regular news service." Such identification cards and attendant privileges are not given to free-lance writ-

ers and employees of weekly newspapers which do not regularly cover police news. This position was recently upheld in the case of *Los Angeles Free Press, Inc. v. City of Los Angeles,* 9 Cal.App.3d 448 (1970).

Visits between inmate authors and their prospective publishers are not prohibited by Administrative Bulletin No. 72/40 or by its antecedent, Administrative Manual Paragraph 415.071. Such visits are not considered news media interviews. The allowance or disallowance of such visits is a matter for institutional regulation. Wardens and superintendents are authorized to permit special-purpose visits on a case-by-case basis, and such visits include visits by an inmate's publisher. In at least one instance, an inmate has been allowed visits with a "ghost writer" to assist him with preparation of material for publication.

Similarly, free-lance writers, staff writers for general magazines (as opposed to news magazines), and persons writing books are not covered by A.B. 72/40, but are allowed to visit inmates at the discretion of the warden or superintendent (subject to departmental review). The exercise of this discretion is based on such factors as the nature of the project under way, the necessity for the interview, and the time available for institutional cooperation.

The definition of "news media representative" is in my view a very liberal one, offering inmate access to hundreds and even thousands of bona fide news gatherers. I have no reason to believe that the definition does not fully protect the inmates' First Amendment rights of self expression. Until and unless it is shown that "news media representatives," as defined in A.B.

72/40, will decline to provide a forum for individual inmates that would be provided by other persons claiming to be news gatherers, I must assume that inmates' rights will be protected by the existing definition.

II

The provision permitting prohibition of interviews at such times in which, in the judgment of the warden or superintendent, interviews would jeopardize the current safety and good order of the institution or be detrimental to the welfare and best interests of the inmate involved is viewed as a measure to be applied rarely, if at all. It permits at most a temporary suspension of interviews during such times as the institution is in a state of unrest, an escape attempt has recently taken place, or for other reasons an interview is not feasible. The impossibility of foreseeing all circumstances requiring the suspension of interviews, including circumstances personal to an individual inmate, such as a recent personal tragedy, requires a regulation vesting latitude in the individual warden or superintendent to make a judgment based on whatever situation may arise. This provision is not intended to permit the circumvention of this Court's order or to authorize an arbitrary application of the provision. Based upon my knowledge of and experience with the various wardens and superintendents, I am confident that it will not be so applied.

III

Inmates psychiatrically diagnosed as psychotic are not permitted interviews because they are not in contact with reality and are in a state of severe emotional

stress. In all such cases it would be detrimental to the best interests of the inmate to expose him to news media inquiries. Similar provisions frequently apply to hospitalized psychiatric patients in the Department of Mental Hygiene or in community mental health programs. The Department of Mental Hygiene generally prohibits interviews with mentally ill patients, although there is a possibility of exceptions, depending on the circumstances of the individual case, and with the specific approval of the attending physician.

IV

Interviews of inmates in isolation or segregation are not permitted. Isolation status is punitive in character. One of its punitive objects is to keep the inmate's contact with others at an irreducible minimum. Isolation status is only temporary; an inmate may be placed in isolation for a maximum of ten days, except with my express approval of a longer period.

The considerations behind the prohibition of interviews with inmates in segregation status are different. Inmates in segregation are often the most recalcitrant, obstreperous and dangerous in the entire prison population. They are separated from the general inmate population because they have been judged, after careful classification procedures, to pose a danger to staff and inmates and the good order of institutions, or because they must be protected from harm at the hands of other inmates or even themselves. Their segregation status is temporary and regularly reviewed. Thus, such men are great security risks and there are extremely difficult problems associated with those in-

stances in which they must be moved to a designated location for press interviews.

Further, there is a very real need to prevent such inmates from gaining notoriety via news media because of their behavior. Such recognition reinforces the type of behavior which caused them to be segregated in the first place. If dangerous and recalcitrant inmates in segregation become heroes or public figures with their peers or the general public by unusual attention from the news media, it is detrimental to the general operation of the institution and to the welfare of the individual himself.

It is my opinion, based on the totality of my correctional experience, that allowance of media interviews with inmates on segregation status would pose unacceptable risks to the safety and discipline of the institutions involved.

Still different considerations support the temporary ban on interviews with inmates newly received from court or recently returned from parole. All newly received or returned inmates face a difficult period of orientation or reorientation to prison. Most of them will spend a temporary period in a reception center and then move on to a permanent assignment at a different institution. Nearly all such men have gone through a very upsetting experience during a trial or in the process of parole revocation. They need time to settle down. In a great many instances, added public attention to their cases would complicate the difficult period of orientation to institutional life. It is my opinion that some reasonable period, varying

from two to six months, depending on the circumstances of the individual case, would be beneficial to all newly received and returned inmates.

V

The regulations respecting interviews with inmates awaiting trial are essentially the same as existed prior to August 21, 1971, and which were approved in *Yarish v. Nelson,* 27 Cal.App.3d 893, 900 (1972): "The imposition of the consent requirement by the inmate, his counsel, his codefendant or by the court as the case may be, is reasonably related to a legitimate end embraced in the police power of the state and is supportive of the prisoners' right to a fair trial." As a state agency, the Department of Corrections has an obligation to protect the legal rights of those persons in its custody who are charged with crime. The regulations in question are designed to effect such protection, and were certainly not, as plaintiffs have suggested, designed to permit circumvention of this Court's order. It is obvious that an inmate awaiting trial who is allowed a media interview could be quoted or misquoted in the news media as making a statement which would be prejudicial to the rights of the inmate himself or codefendant. The regulations in question do not permit a member of the Department to prohibit an interview with an inmate awaiting trial, but confer such prohibitory power only upon the inmate's attorney (who is charged with protecting his client's rights) or a judicial officer, who must be presumed to act in a lawful manner and with due regard for the interests of

maintaining the right to a fair trial. The rights of an inmate's codefendants must certainly be protected, and the regulations protect these rights, not by requiring the consent of codefendants or their counsel to any interview, but merely by imposing a requirement of notice, which would permit codefendants or their counsel to exercise any options which may be open to them to protect their own legal rights.

VI

The limitation of interviews with a specific inmate to once in any six-month period aims principally at permitting the inmate to concentrate on serious and constructive programs and requirements of the institution without becoming embroiled in and diverted by personal publicity to build his status with fellow inmates or the public. Because of media attention there have been extreme cases in which inmates had time for little else but media interviews. For example, one inmate was interviewed 66 times in a six-month period. This limitation is an attempt to provide reasonable guarantees of the inmate's right to access to the news media while preventing gross abuse such as that cited above. With this limitation, additionally, it is much less likely that certain very notorious inmates will enhance their status from a prison cell forum. Such inmates will be in a better position to devote themselves to useful activities such as school, counseling, psychiatric treatment, and other programs if they are limited to news media interviews only once in any six-month period. It is noted that exceptions to this

limitation can be approved by me if circumstances warrant.

Further, this limitation permits orderly scheduling of interviews and allows departmental personnel to discharge their regular functions without undue diversion by the necessities of scheduling, arranging for, and supervising interviews. If each inmate in the Department had one interview every six months, there would be some 45,000 annual interviews, which would constitute a crushing administrative burden. Such a possibility is, of course, unrealistic. But if only 10% of the inmates had semiannual interviews, some 4,500 would take place. If a larger number of interviews per inmate in a six-month period were permitted, the above figure, representing potential interviews, would be multiplied accordingly and pose extremely difficult administrative problems.

VII

The provision that news media may be required to pay for the cost of any added supervision or security arrangements which may be deemed necessary in connection with an interview contemplates only rare instances. A simple interview with an inmate on mainline status would ordinarily not entail extra costs for supervision or security which would have to be passed onto the news media. In any event, only actual costs for extraordinary services would be assessed against the media. I do feel, however, that the State has no obligation to "foot the bill" for such extraordinary services, and that in those rare instances in

which such services may be necessary, it is proper to require that the costs be borne by the media.

VIII

I should also like to point out that any decision made by institutional personnel concerning the application of any of the provisions of A.B. 72/40 may be appealed by the inmate (via sealed letter) or the media person involved to the institution head, to the Deputy Director of Corrections, to me, and to the Secretary of Health and Welfare, any of whom has authority to overrule the decision. This appeal procedure provides a mechanism for the exhaustion of administrative remedies and should ensure that no question of the proper application (as opposed to the content) of the regulations need be brought before this Court for resolution.

I declare, under penalty of perjury, that the foregoing facts are true and correct according to the best of my knowledge and belief, and that if called as a witness, I could testify competently thereto.

Dated: November 21, 1972.

/s/ R. K. Procunier

[Jurat and Declaration of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed 1/30/73]

[Caption Omitted in Printing]

MEMORANDUM AND EXHIBITS IN RESPONSE TO THE AFFIDAVIT OF DEFENDANT RAYMOND K. PROCUNIER CLARIFYING ADMINISTRATIVE BULLETIN No. 72/40

Plaintiffs submit this memorandum and attachments in response to the affidavit of defendant Raymond K. Procunier, which has attempted to clarify and explain Department of Corrections Administrative Bulletin No. 72/40.

I.

The definition of "news media representative" as delineated in Department of Corrections Administrative Bulletin No. 72/40 (hereafter called "the interim rules") is so limited that it subverts the orders of this Court issued on September 28 and October 31, 1972, which establish the first amendment rights of prisoner plaintiffs in this action to interview with representatives of the media. The only reason that Mr. Procunier states in his recent affidavit for imposing any limitation on which media can visit is "to limit interview privileges to a reasonable number of legitimate, as opposed to self proclaimed, representatives of the media" (Procunier affidavit, p. 2). While plaintiffs do not question Mr. Procunier concern with limiting media interviews with true representatives of the media, the standards that Mr. Procunier has

created are so arbitrary so as to exclude many representatives of "legitimate" media including *all* of the media plaintiffs in this present lawsuit. The result is that plaintiff prisoners are totally prohibited from interviewing legitimate, qualified media representatives who are often the only media persons who are concerned enough to take time to interview a prisoner. For Mr. Procunier to say that prisoner plaintiffs have adequate access to the media is meaningless when those publications have their own limitations and often do not want to interview prisoners. This stand is even more tainted when there are media people like the media plaintiffs in this lawsuit who are often the most concerned and responsive to the communication needs of prisoners who are already available to interview prisoners. The attached affidavits of several plaintiffs as well as letters from two professors at the Department of Communications at Stanford University should be examined to demonstrate the arbitrariness that the interim rules have imposed in disservice to the first amendment. (See attached affidavits of plaintiffs Paul Jacobs, Eve Pell, Bobby Bly and Betty Segal, and letters of Professors David L. Grey, and William L. Rivers.)

Mr. Procunier's affidavit completely shifts the burden that should be met by the defendants to support their arbitrary interim rules that act as a prior restraint on the first amendment rights of the plaintiffs. He claims that since the prisoner plaintiffs have been given certain media outlets by the interim rules, they are entitled to none other. The defendants have raised

this same argument at an earlier stage of this proceeding when they claimed that prisoner plaintiffs were entitled to *no* media interviews since they could always right letters to the media. The court already rejected this contention that one channel of expression was adequate to protect the plaintiffs' first amendment rights when it determined that the defendants' ban of media visits was invalid. The Court should apply the same logic and declare invalid the rules that exclude certain media representatives to act as proper communications channels for the prisoners.

The fact that Mr. Procunier claims that interviews with other media representatives, not specified in the interim rules, can be allowed at the discretion of the warden does not solve the problem that a certain portion of the media are categorically deprived from helping prisoners to exercise their first amendment rights and are allowed to do so only in a state of grace. The very fact that this discretionary power is permitted emphasizes that the exclusion of certain media has been unscientifically based on arbitrary grounds which bear no real relation to security needs and space requirements. Plaintiffs also express grave doubts to the good faith of this representation of Mr. Procunier since none of the visits that have been requested in this lawsuit have been allowed on this discretionary basis.

Defendant Procunier's major problem in attempting to create standards to define a "media representative" is that he is operating from a position of ignorance in that area. Despite his many other qualifica-

tions listed in his affidavit, Mr. Procunier isn't the proper person to defeine what media is, what media does, and what a media representative may be. Mr. Procunier directs a prison system and is not qualified to determine who a media person is. He has chosen to select certain limited standards to impose on media interviews in prisons, which appear completely out of place when analysed by persons qualified to determine who media representatives actually are. The letters and affidavits referred to earlier which have been prepared by persons who are in media and persons qualified to teach about media hopefully will clarify for the Court how media persons see themselves, how they define their work and their needs, and how they provide channels of communication for prisoners; these reports also reveal the principal defects of the Procunier affidavit and interim rules. (See Jacobs, Segal and Pell affidavits and Grey and Rivers letters.)

It is clear from the exhibits attached hereto that media refers to all the various channels through which communications occurs and information is disseminated. Although this lawsuit focuses on the realm of public *media,* where the information is ultimately disseminated to the public at large, this is not limited to the so-called "news media." There are other forms of journalistic media, that is not news, through which the ideas of prisoners should merit expression. While reporters with press passes may be found in the realm of news media, the free-lance writer with special expertise about a particular subject, such as prisons, is

the source of most of the copy in what can be termed non-news type publications. Mr. Procunier's assertion that those media representatives who are not covered by the interim rules may be permitted interviews "in the wardens' discretion . . . based upon such factors as the nature of the project . . ." clearly amounts to prior censorship and offers a compelling reason why a broader more realistic definition of media should be applied in this case. (See Procunier affidavit, p. 3.) Plaintiffs have suggested the definitions of media and media representatives that are found in the attached "Plaintiffs Proposed Media Interview Regulations" to reflect the reality of media today without sacrificing the first amendment.

II.

Despite the qualification that Mr. Procunier makes in his affidavit that the provision allowing for the suspension of media interviews would only be used during crises situations, the section as written is unconstitutionally vague and overbroad. To apply the language of *Cox v. Louisiana (I)*, 379 U.S. 536, 557-558:

> It is clearly unconstitutional to enable a public official to determine which expression of view might be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing broad discretionary licensing power or as in this case, . . . the practice of allowing unfettered discretion in local officials . . . is an unwarranted abridgement of . . . (the) freedom of speech and assembly.

Mr. Procunier has been able to articulate in his affidavit many more specifics than are included in the interim rules themselves and a similar specific listing could be included in the actual rules promulgated by the department to assure a definite limited standard. When the freedoms guaranteed by the first amendment are being impinged, this specificity is vital. See *Grayned v. City of Rockford,* ..... U.S. ....., 92 S. Ct. 2294 (June 26, 1972); *Coates v. Cincinati,* 402 U.S. 611, 91 S. Ct. 1686 (1971); *Cox v. Louisiana (I), supra; Amsterdam,* 109 U. Pa. L. Rev. 67 (1960), The Void For Vagueness Doctrine in the Supreme Court.

Plaintiffs have suggested in their proposed regulations that visits be allowed at all times that other visits to the prisoners are allowed. Only when a true emergency exists and the prison officials do not have enough control of the prison to allow prisoners to come to the visiting room should they have the discretion to suspend visiting rights between prisoners and media. Only in a situation where a "clear and present danger" exists which media visits would aggravate should the rights protected by the first amendment be suspended. (See Sec 10.00 Proposed Regulations)

III

Mr. Procunier's explanation why "psychotic" prisoners are not permitted interviews with the media is another unqualified opinion which he as a prison administrator is not competent to make. Dr. Fank Rundle, former chief psychiatrist of Soledad Prison and current Acting Director of Prison Mental Helath

Service of the Health Services Administration of New York, responding to the interim rules and the Procunier affidavit totally repudiates the archaic attitude that psychotics should be barred from having visits with the press. Dr. Rundle notes that the term "psychotic" is an imprecise generalization which could be overly applied. "Institutional needs are placed above the needs of individuals" and "pressures from custodial personnel" often determined which prisoners are determined to be "psychotic". Including Dr. Rundle rebuts the justification offered by Mr. Procunier that "psychotics are kept from the media for their own good by showing that outside contact of all types including interviews from the media can only be beneficial to prisoners whether they are labelled "psychotic" or not.

IV.

The reasons stated by Mr. Procunier for not allowing prisoners in segregation or isolation to interview with the media are legally impermissible. Mr. Procunier claims that the major consideration for not allowing prisoners in isolation to receive media visits is because they are being punished. This explanation appears to be incredible in light of the subject matter of this case and orders that have already issued. Although it is clear that all prisoners are being punished by their confinement in prison, it is equally certain that they retain certain first amendment rights and one of those rights as already defined by this Court is the right of free speech and the right to interview

with members of the media to implement that right. Simply stated prison officials cannot punish a prisoner by cutting off his first amendment rights. As plaintiffs have already demonstrated, apparently to the satisfaction of this Court, in their "Memorandum In Support of Motion for Preliminary Injunction," March 7, 1972, pp. 7-12, and in virtually all other pleadings filed in this case, the law is clear that deprivation of first amendment rights cannot be a *method* of punishment. While first amendment rights may be suspended when the speech itself comes into conflict with some compelling state interest by presenting a clear and present danger, what Mr. Procunier is claiming in his affidavit is that totally innocent speech may be barred for general punitive purposes. The outrage is further compounded when one is aware that despite the fact that the purpose of isolation status "is to keep the inmate's contact with others to an irreducible minimum," (See Prounier affidavit, p. 5) visits from family and friends are allowed at San Quentin even for prisoners in isolation. (See attached San Quentin Visiting Privileges, November 1, 1972, #15). Similarly, the prison officials have not considered suspending the right of prisoners in isolation from having attorney visits. The Court should note that prisoners in isolation are being subjected to the most onerous conditions in the prisons and are likely to have much to express to the media. To punish a prisoner by suspending his first amendment rights should be viewed in the same light that beating a prisoner for punishment is seen—each is proscribed by the first and eighth amendments respectively.

Mr. Procunier has attempted to justify the arbitrary ban on media interviews with prisoners in segregation by his characterization of those prisoners as the most dangerous and raising the spectre of violence to support his assertion. Mr. Procunier has confused the Court by not fairly explaining who is in segregation. Not only are prisoners there for a wide variety of disciplinary offenses, predominantly of a nonviolent nature, but there are also prisoners who have never been charged with a disciplinary infraction who are segregated in either —COPY RAN OFF PAGE. Many of those prisoners in "administrative segregation", as plaintiff Bobby Bly was, are so confined without any disciplinary charges ever being filed and for constitutionally impermissible reasons such as political ideology. (See attached affidavit of Bobby Bly) Refusing to allow the media to interview prisoners like Bobby Bly, whose illegal confinement in segregation is now being litigated, helps to further perpetuate questionalble practices of the Department of Corrections by preventing the public from ever hearing the first hand complaints of the prisoners who are so confined, with no due process for impermissible reasons.

Even in the case of those prisoners who are in segregation for alleged disciplinary reasons, Mr. Procunier has gone no further than he did when defending the primary issue in this lawsuit for which plaintiffs have already been successful in obtaining a temporary restraining order. Defendants earlier in these proceedings made the argument that prisoners categorically would pose a security risk if they had media

interviews, since "big wheels" or heroes would be created in the prison population and pose a threat to the institution. In the Memorandum Opinion of September 28, 1972, this Court took notice of that justification offered by the defendants and still found that defendants' regulations and conduct posed a prior restraint on the first amendment rights of the prisoner plaintiffs. Just as the speculative fears of prison officials were not sufficient to bar media visits to prisoners generally, their speculation is not enough to bar such visits with prisoners in segregation. This type of analysis was specifically reaffirmed by Judge Gessell in the case of *Washington Post Co. v. Kleindienst,* Civil Action No. 467-72, U.S. D.C., D.C., Supplemental Memorandum, December 19, 1972, after the issue of the "big wheel" theory was remanded by the Court of Appeals for further fact finding. (See opinion attached).

Although prisoners in segregation may in some instances pose a greater security problem than other prisoners, to totally eliminate their right to visit media seems to be a method for which there are clearly less restrictive alternatives that could be utilized to meet security needs and still not retard these prisoners freedom of speech. Prisoners in segregation have visits with family and friends and they visit with their lawyers. In both of those situations prison administrators have been able to establish a greater degree of security necessary for prisoners in segregation without the necessity of barring those visit entirely. It appears inconsistant for Mr. Procunier to

say that barring media visits to prisoners in segregation is the only way to achieve necessary security.

Prisoners in segregation are often there for a myriad of impermissible reasons that have already been mentioned. The conditions of segregation are many times the most brutal and arbitrary and deserving of exposure to the public. First hand stories from prisoners who are actually being subjected to such treatment to responsible media representatives may help to create a climate where those inequities are eventually eliminated.

V.

The interim rules provision suspending the right for media interviews for prisoners who have been recently returned from court and those returned from parole appear to be arbitrary violations of the first amendment, as a prior restraint on free speech, and the fourteenth amendment's equal protection clause. For Mr. Procunier to limit these particular prisoners' freedom of speech and also create a separate burdensome classification for them he must first establish a compelling state interest for taking that action. Mr. Procunier fails to meet that burden in his affidavit, since all that he has done to defend the rule is to allege that immediately after entry to prison the transition is difficult and in his opinion it is best to keep prisoners away from the media. He claims that "added public attention to their cases would complicate the difficult period of orientation to institutional life." (Procunier affidavit p. 6.) He offers no specific

evidence to support his contention and clearly makes no attempt to show how the need for this special classification overbalances the prisoners' freedom of speech and the right to be free from discriminatory classifications. The added factors that a person recently returned from court may have particular current information about his case and that anyone who has recently come to prison may have a prior working relation with a media person make plaintiffs' objections even more compelling.

VI.

The provisions of the interim rules that prohibit interviews with prisoners awaiting trial creates blatant problems arising from the equal protection clause of the fourteenth amendment. Why should a prisoner awaiting trial while he is confined in state prison have his first amendment rights limited to any greater degree than a person awaiting trial who is not in prison? None of the reasons stated by Mr. Procunier in defending the interim rules address themselves to that crucial problem. A prisoner who is charged with a felony or other crime and who is either confined in a county jail as a pre-trial detainee or who is not in custody can speak to the media without all the prerequisites listed in the interim rules. Mr. Procunier claims that "As a state agency, the Department of Corrections has an obligation to protect the legal rights of those persons in its custody who are charged with a crime." (Procunier affidavit, p. 7.) This overlooks the fact that county jails are also a state agency and they have found no great difficulty in protecting

the legal rights of persons charged with crimes without suspending certain other of those legal rights such as those protected by the first amendment. This analysis also neglects the doctrine of the separation of powers and usurps the judiciary's right to impose a gag rule if that is necessary for a particular case. Mr. Procunier also conveniently avoids the fact that even if there is a court imposed gag rule concerning a particular criminal proceeding, that gag rule applies only to the matters involved in the criminal case and not a blanket prohibition against all contact with the media.

Mr. Procunier is concerned with the rights of co-defendants, which is thoughtful, but illegally intrusive in this situation. To pose the co-defendant problem in its most dramatic form, what would happen if one defendant was confined in a California state prison and the co-defendant was free on bail? Clearly the restrictive regulations concerning media contact would apply to the person in state custody but would not apply to the person free on bail—a denial of equal protection.

The requirement that the prisoner's lawyer must give consent before a media interview violates the equal protection clause as well as overlooking the basic relationship between the lawyer and his client. Basically the lawyer is the retained employee of the client and for the lawyer to be required to give his consent on aspects of how the client is to conduct his life is as absurd in prison as outside prison. Outside prison, the usual practice is for the lawyer of a per-

son charged with a crime to advise that person what types of things he should or should relate to the media and whether it is advisable to communicate to the media at all. Once the client has been so apprised, he is free to make his own choices at his own jeopardy. There is no reason why these same methods are not sufficient in a prison setting, rather than the bureaucratic, time-consuming scheme included with the interim regulations. The requirement of lawyer consent is particularly frightening in the situation where there is counsel appointed and the prisoner defendant is attempting to have appointed counsel replaced by counsel of his choice. This is actually true in the case of plaintiff John Larry Spain, whose application for counsel of his choice in the Marin County Superior Court is awaiting the determination of the California Supreme Court in the case of one of his co-defendants, *In re Drumgo.*

VII.

Prior to the controversy in this case that arose out of the events of August 21, 1971, prisoners in the custody of the California prison system were allowed an unlimited number of interviews with media representatives who agreed to come to interview—all without any general problems arising. It is curious that instead of relying on the Department of Corrections own past experience and specific past records of those earlier interviews that occurred before August 21, 1971, Mr. Procunier has chosen to rely primarily on a hypothetical projection of how many interviews could potentially occur to justify limiting media visits

to one every six months for each prisoner. Perhaps the reason that Mr. Procunier has had to rely on a future projection is because past records simply do not support his prediction that the visiting room will be swarming with people comming to interview prisoners. The Answer of Warden Louis Nelson of San Quentin Prison to Interrogatories, dated April 7, 1972 seem to support this conclusion. When in Interrogatory No. 4 Mr. Nelson was asked: "Over the past year (February 20, 1971—February 20, 1972) how many prisoners have requested interviews with outside media?" Mr. Nelson answered, "We have no records of this information. *Requests by prisoners for interviews with media are rare,* and none are recalled." (emphasis added) If such interviews are so *rare,* then Mr. Procunier's speculation appears to be completely out of proportion with reality. This is probably true since unfortunately members of the media have other committments and have been all too reluctant to come to prisons to interview prisoners except on a very limited basis. So dispite the fact that in one very dramatic instance a prisoner had 66 visits within a six month period (still less than three per week), Warden Nelson stated that media interviews were "rare" and said "none were recalled", since most prisoners apparently have none.

Besides projecting numbers into the future, Mr. Procunier has attempted to rationalize the six month rule by raising the strong, disruptive, "big wheel" spectre in a slightly different form. At this point, Mr. Procunier argues that too many visits will create the "big wheel" and cause an imbalance in prison equilib-

rium. But again plaintiffs can discern nothing more than the same unsubstantiated, opinionated speculation which has already found to have defective logic by this Court and the court in the *Washington Post* case whose most recent pronouncement on this precise issue is attached.

Mr. Procunier's contention that allowing too many media interviews will have a deleterious effect on a prisoner's rehabilitation by interfering with his prison program is further guesswork on his behalf and is supported by no factual evidence. Besides being completely speculative, this notion of minimizing media contact for rehabitlitative purposes is undercut by two factors. First, no other types of visits are limited in this manner to achieve better rehabilitation. The Department of Corrections' own research division has recently found that quite the opposite is true, and better visiting arrangements while in prison create a better chance for the prisoner to succeed when he is released on parole—there is a direct positive correlation. (See sections of "Explorations in Inmate-Family Relationships, California Department of Corrections Research Report No. 46, Norman Holt and Donald Miller, January, 1972 (Hereafter called the *Holt Report.*) This may be true because, as Dr. Rundle states in his letter, "An interview with an interested person whether news media representative or not would have a beneficial effect upon any inmate, whether 'psychotic' or not, since it would at least for a brief time offset the psychological devastating effect of isolation from the community which is imposed by prison." (See Rundle letter, attached) Second, the

unfortunate fact is that many prisoners are not able to participate in meaningful rehabilitative programs for various reasons. Consequently, a prisoner is not missing anything significant by taking time for a media interview; only the "devastating effect of isolation" which Dr. Rundle speaks of.

Prisoners should be allowed unlimited visits from the media for interviews each day the prisons are open to visitors. If this is shown in fact to be burdensome, the prison officials would then be in a position to document any limitations that may be necessary. In doing so, the Department of Corrections should carefully note the concluding paragraph of the Holt Report which states: "All restrictions on visitors and mail should be closely scrutinized with the objective of eliminating all regulations which are not necessary to promoting the absolute basic security of the institution. *No restriction should be allowed to remain whose only reason is the limit in space. Space must be found.*" (See attached *Holt Report,* p. 64.) Prior to a showing that frequent visits by media representatives cause a real burden to prison administration, the Department of Corrections should not be permitted to impose such stringent limitations as the six month delay between interview section, since it so seriously interferes with the rights of prisoners to have meaningful interviews (See Jacobs affidavit, p. 3.)

VIII.

Plaintiffs would not question the portion of the interim rules that call for assessment of costs for

interviews if the rules themselves were explicit and clearly indicated that there would be no additional costs for ordinary interviews that could occur in the regular visiting areas, as Mr. Procunier's affidavit does. However the attached letter from Lee DeBord, San Quentin Information Officer, to Mark Schwartz of radio station KPFA, provides clear evidence of the abuses of this regulation that have already been realized. Plaintiffs do not question the need to charge for services that go beyond simply making it possible for a simple interview to take place by having the prisoner and media person come together in the regular visiting area, and they specifically provide for special cost in section 7.00 of the Proposed Regulations. This type of assessment should be only for special types of interviewing with specific extra costs to the prison.

IX.

Although the appeal procedure outlined in Mr. Procunier's affidavit is useful, it should be limited to the most difficult situations that require particular scrutiny—those where specific abuses are raised to bar a media representative from having an interview with a prisoner. In this paramount area of the first amendment, the burden is on the state to show why infringement on free speech is vital, and this burden should not be reversed by an elaborate appeals system that must be utilized before the most ordinary interview is realized. Hopefully explicit rules such as those proposed by the plaintiffs will eliminate the need for appeals in all but the most questionable interview situations.

X.

Although plaintiffs neglected earlier to question the requirement that notice for an interview be given to the warden one week in advance in writing, it strikes plaintiffs as an unnecessary burdensome procedure in light of other visiting practices of the Department of Corrections. Visiting with family and friends requires no prior notice. Visits from attorneys generally require no prior notice to the prison. Certain prisons such as Deuel Vocational Institution and Folsom Prison which request prior notice for legal visits appear to do so for the purpose of arranging for private interview area outside the regular visiting areas; however, even those prisons which require notice for attorney visits are usually satisfied by a telephone call on the way to the prison and failure to comply with prior notice requirements results only in delay not complete prohibition of the visit. It is hard to conceive of any reason why such a long time is needed to prepare for simple media interviews that could be held in regular visiting areas and for no other type of visit. Any examination of identification credentials can occur at the gates of the prisons as it does with other visits.

Conclusion

The Temporary Restraining Order issued by this Court on October 31, 1972 should be modified to prevent defendants from imposing the restriction of the interim rules, Administrative Bulletin, 72/40, on media interviews and the Court should incorporate

the Plaintiffs' Proposed Media Interview Regulations in its order as standards for defendant conduct.

Respectfully submitted,

/s/ Richard M. Doctoroff
Richard M. Doctoroff
Patti Roberts
Counsel for Plaintiffs

Jan. 29, 1973

[Exhibit A]

Plaintiffs' Proposed Media Interview Regulations

1.00 All consenting prisoners shall be permitted to have confidential interviews with representatives of the media.

2.00 Media shall be defined as follows:

2.10 All newspapers, magazines and other regular publications, including but not limited to those which qualify for second class United States mailing privileges;

2.20 All radio and television stations that are licensed for public broadcast by the Federal Communications Commission and all networks composed of those stations;

2.30 All publishers of books;

2.40 All news services;

2.50 All film and videotape production companies.

3.00 Media representatives shall be defined as follows:

3.10 All persons who are employed by the media defined in 2.00 above in a reporting, writing, editing, publishing, directing or photographing capacity;

3.20 All free lance writers, reporters, editors, publishers, directors or photographers who are affiliated with any of the media as listed in 2.00 above for a particular project;

3.30 All free lance writers, reporters, editors, publishers, directors, or photographers who earn "a substantial portion of their income" from free lance media activities.

4.00 Consent by prisoners for media interviews shall be given in the following three forms:

4.10 A letter from the prisoner to the media or media representative asking for an interview; or

4.20 A letter or other writen authorization from the prisoner's attorney authorizing the interview with the prisoner; or

4.30 A consent form signed prior to the commencement of the interview.

5.00 Identification credentials may be required to be presented by media representatives at the time of entry into the prison for the interview.

6.00 Interviews occurring in the area of the regular visiting facilities will be limited in time only by existing space requirements; in no case shall the length of the interview be limited to less than one hour.

7.00 There will be no cost assessments for regular interviews that take place in the area of the regular visiting facilities; special type interviews outside the

facilities used by other visitors may result in charges for extra costs to the prison.

8.00 Special type interviews, such as those that involve filming, which take place outside the area of regular visiting facilities in other portions of the prison shall be requested at least one week in advance.

9.00 Tape recorders will be provided to media representatives who provide their own tape cassettes; special prior arrangement at least one week in advance shall be required for other equipment necessary to be brought into the prison.

10.0 Interviews with representatives of the media shall be suspended only in the event of extreme emergency when officials no longer have sufficient control of the prison and a clear and present danger makes it impossible for the officials to safely transport prisoners to and from the interviewing facilities.

[Exhibit B]

AFFIDAVIT OF PAUL JACOBS

State of Hawaii
County of Honolulu—ss.

I hereby swear and depose as follows:

I am a writer, an Associate Fellow of the Institute of Policy Studies in Washington, D.C., and a Research Associate of the Center for the Study of Law and Society, University of California, Berkeley. I am also a member of the Society of Magazine Writers, the professional organization of magazine writers, and of the Authors' League, the professional group of published writers.

In addition, I am a television commentator. I also write and produce television programs and motion pictures and lecture at college and university campuses all over the country.

I have written seven books, all published by major publishers, and hundreds of articles for such general magazines as Atlantic, Commonweal, Commentary, Harpers, New York Review of Books, New York Times Magazine, Playboy, Ramparts, and the Reporter. I have also published articles in professional and technical journals such as the California Law Review, The Economist of London, and the American Sociological Review, to cite just a few.

I was a member of the Journalism Faculty of the University of California at Berkeley and have taught at California State University at San Francisco. I have been the Regents' Professor at the University of California at Santa Barbara and have appeared as a guest lecturer at Police Training Institutes conducted for highranking police officials by U.C.L.A. and U.S.C. I have also addressed conventions of parole and corrections officers and the American Psychological Association, the American Sociological Association, the American Orthopsychiatric Association, and the National Conference on Social Welfare.

My entire professional work focuses on the social issues confronting society, including of course the criminal justice system. I have studied R. K. Procunier's affidavit concerning the regulations established by the Department of Corrections under A.B. No. 72/40, and I believe Mr. Procunier's justification

for these regulations to be completely unsatisfactory. The definition he cites of "news media representatives" established by the Correspondents' Association, the California Highway Patrol, and the Los Angeles Police Department is totally irrelevant to the issue involved for writers like me. The rules for membership deal, primarily, with the use of facilities such as the press rooms, teletypes, office space, etc., and are not designed to prevent journalists from access to legislative sessions or from interviewing legislators. The issuance of police press cards is equally irrelevant as a justification for the Department of Corrections policy since those cards do no more than give the reporters the right to cross police lines. Whether a journalist has a press card or not does not affect a journalist's right to interview police officials, for example. Indeed, I have interviewed many police officials and never once have I been asked for a press card.

Mr. Procunier maintains that a writer like me would not be covered by A.B. No. 72/40 and that my right to interview a prisoner and the prisoner's right to be interviewed will be determined by the warden or superintendent. But if "news media representatives", as defined by Mr. Procunier, cannot be restricted in their visits by the warden, it is totally discriminatory for the warden or superintendent to be given first the authority to determine who fits the description he has established and then have the right to determine whether the "nature of the project" on which I may be engaged, with permission of a prisoner, is acceptable to the prison authorities.

The writer's freedom to study a problem such as the prison system and prisoners is as essential a part of freedom of speech as is the protection extended to newspaper, television, and radio representatives. But A.B. No. 72/40 restricts scholarly or journalistic work to that approved, in advance, by the warden, giving the warden a right no one else in the society possesses, and one which has no relationship to the proper functioning of a prison. If the right of a Time reporter to interview a prisoner does not disrupt the prison system, then my right is equally valid, and perhaps even more so.

Similarly, the six month limitation on interviews is another abridgement of my rights and those of the prisoners. In no situation such as an interview of the kind I carry on, would it be possible for me to gather the material I would need in one interview session. Normally, it might take three or four such sessions, and I do not believe the warden or superintendent has the right to determine the character of the work I do.

For these reasons, I believe that A.B. No. 72/40 as interpreted by R. K. Procunier is a fundamental abridgement of my rights, those of the prisoners, and of society in general, since cutting off access to the prison means that the public is cut off from access to one of the major problems it faces.

Paul Jacobs
/s/ Paul Jacobs

[Jurat Omitted in Printing]

[Exhibit C]

AFFIDAVIT OF EVE PELL

State of California
City and County of San Francisco—ss.

Eve Pell being duly sworn deposes and says:

I graduated from Bryn Mawr College, Bryn Mawr, Penna., in 1958, *cum laude* and with honors. After several years of teaching school, I became a free lance writer. I am co-author of *To Serve the Devil,* a history of minorities in the United States published by Random House in 1969, and editor of *Maximum Security: Letters from Prison* (E. P. Dutton, 1971). I have writen articles for newspapers and magazines, both national and local. My work is included in several anthologies: *Politics of Punishment,* edited by Erik Wright (Harper and Row, 1973); *Law Against the People,* edited by Robert Lefcourt (Random House, 1971); *If They Come in the Morning,* edited by Angela Y. Davis (Third Press, 1972), and a recent collection of writing about prisons edited by Ramparts Press.

As a free lance writer, I am seriously handicapped by the California Department of Corrections regulations concerning interviews between consenting prisoners and news media representatives. As one who has specialized in research and investigation into the California prison system for the last three years, and in studies of minority people before that, I have more background and experience, and therefore more capac-

ity to evaluate prison situations than most other reporters. Denying free lance writers access to interviews with prisoners is discriminatory, and blocks qualified observers from interviewing prisoners, while allowing general reporters, who happen to work full time for certain publications, to do so. The regulation restricts serious, sustained coverage of developments in the correctional system.

Because the general public is excluded from prisons, a free flow of information via the media is crucial if there is to be an informed electorate. The public is just now becoming aware that serious difficulties exist in our correctional system; in order to reach intelligent decisions about legislative and other proposals concerning prisons, a maximum of information is required.

Without access to varying kinds of media representatives, prisoners will be unable to express their opinions and evaluations of the correctional process, while the authorities are free to publicize theirs.

Free lance writers, by the nature of their work, can take the considerable time required to gain expertise on such institutions as prisons, since they are not simultaneously involved with other news stories demanding their time and attention. It seems manifestly unfair to me that such writers, because they are forbidden to interview prisoners, should be penalized for the occupation they have chosen to pursue.

Saturday Review asked me many months ago to write an article which requires an interview with

Johnny Larry Spain. Because of the California Department of Corrections' Rules, I have been unable to interview Mr. Spain, and unable to complete the article for *Saturday Review*. This seems to me to be an infringement of Mr. Spain's First Amendment rights, of my rights as a journalist, and undue interference with information about a public institution.

/s/ Eve Pell
Eve Pell

[Jurat Omitted in Printing]

[Exhibit D]

[Caption Omitted in Printing]

AFFIDAVIT OF BOBBY BLY

Bobby Bly, being first duly sworn, deposes and says:

I am a prisoner presently incarcerated in San Quentin State Prison and I am a named plaintiff in the civil rights lawsuit, *Hillery v. Procunier*. I joined in this lawsuit as named plaintiff in order to restore my constitutional rights, protected under the First Amendment to the U.S. Constitution. These rights should allow me to see and talk with representatives from the media and express my views on different topics freely, as well as fully describe the conditions I am being subjected to as a black prisoner.

On or about September 3, 1971, I was taken from my regular cell in the mainline population and placed

in A-section, which at that time was being used as a punitive segregation unit where conditions were far worse than on mainline. Though I was never given full notice of why I was being punished I was told that I was not receiving the customary disciplinary write-up. But, I was being so punitively treated because of my so-called "past record" and "militant beliefs". As a matter of fact, my disciplinary record has been quite good soince at San Quentin and I had received only minor write-ups for a long period of time prior to the transfer.

Briefly, the conditions that I was subjected to in lock-up included practically 24 hour a day lock-up exercise was cut off for weeks totally and then stringently limited for months because of this segregation confinement. I was not allowed to work or participate in any of the regular vocational, academic, recreational or educational programs. Furthermore, over this period of time I had serious medical problems and was not properly treated and subsequently have had a heart attack though I am young and had been in good physical condition.

The reasons why I was locked-up had very little to do with my behavior, beliefs or actions, but instead were caused by vague and unsubstantiated charges such as holding militant beliefs. I am a black man, that is true and I try to maintain myself with respect, integrity and dignity. I do feel that oftentimes prisoners are treated unfairly and oftentimes black and other minority peoples are discriminated against. I have never engaged in any illegal activities, militant

in nature or otherwise, as has been intimated while incarcerated in prison.

During this period of time, I had wished to (and I still do) communicate the facts of my confinement and the fact that most of the 200 men punitively locked-up were black and brown. I filed a lawsuit on this matter, also in federal court and the suit is still pending. I thought that it was important to speak with Betty Segal of the Richmond publication, *The Freedom News,* and inform the public of the actions I believed were illegal. The most important of these was that the confinement in segregation was unfair. A restriction, such as proposed by the Department of Corrections as elaborated in the Affidavit of R. K. Procunier, on prisoners incarcerated in lock-up units, or charged with disciplinary infractions or in segregation would prevent communication of one of the most common abuses in prison. I would like to stress that I was confined without just cause in such a unit, not for a few days or even for a few weeks but for many months.

It is not in fact the case that those insegregation are always subject to disciplinaries, oftentimes prisoners are confined such as myself, without any charges whatsoever. Sometimes it is because there is trouble in the institution, a transfer is imminent, or one has just arrived from another institution, or one is unassigned (through no fault of the prisoner), or under the umbrella category, 'for institutional convenience".

It is furthermore oftentimes the case that classification procedures are hasty and not careful at all.

For example, on most occasions when I went to the Classification Committee, the interview was less than 5 minutes, I was never told why I was being held or what specifically I did. Charges of "wrong beliefs" cannot constitute a careful screening. Review often comes after very long intervals, frequently 90 days.

Even during the period I was segregated I don't believe I was ever considered recalcitrant, obstreperous or dangerous, nor a security risk or extremely difficult problem. In fact, I was given a parole date during this period.

If news media representatives were strictly limited as suggested by Mr. Procunier, my first amendment rights to communicate with the press would be virtually obliterated. This is because of a number of different factors. Though I would have been anxious to communicate to daily papers or national magazines, I have no access to such publications, and as far as I understand they would not come to talk with me. I do not have the ability of calling press conferences, making phone calls etc. as do individuals on the outside, nor do I request such things. It is however, exactly such publications as *Freedom News,* which is smaller in circulation and directed to a more limited community that is interested in speaking with me.

Furthermore, by excluding such publications, also eliminated would be most publications designed for such minority communities as is generally serviced by smaller publications like *Freedom News* or the *Sun Reporter.* Though there financial resources are smaller than the *Chronicle* and they cannot afford to

publish daily, for example, they still report the news and communicate to the public.

Dated: December, 1972

/s/ Bobby Bly
Bobby Bly

[Jurat Omitted in Printing]

[Exhibit E]

AFFIDAVIT OF ELIZABETH SEGAL

Freedom News and the Right of News Access to Prison Inmates

The Freedom News, of Richmond, is a small monthly newsmagazine which attempts to present a critical, in-depth look at some of the issues of the day, based on first-hand reporting and investigation by persons who are wminently qualified yet possess no official press credentials. Some are college professors, some are graduate and undergraduate students, and some merely citizens who have expertise in some particular field which they write about. In no case can these people obtain regular press credentials. Nevertheless, the wuality of reporting done by them has been of consistently high quality, so much so that anthologies of small newspapers, university libraries, and other students of the news media have praised Freedom News for the excellence of its coverage in the past three years.

There is no more serious social issue today than the state of our prisons and the nature of prison inmates.

The prison issue has been clouded with accusations and counter-accusations, with mysteries and intrigue. The direction of prison reform, and the rapidly growing degree of public interest in this topic, has resulted in Freedom News devoting some space to these matters in every recent issue. The November issue carried a very penetrating interview with David Hilliard; previous issues have explored some of the mysteries connected with the celebrated Soledad case that finally ended in the death of George Jackson.

There is no substitute for first-hand information, and no proof that to read a story in a large daily newspaper means to have access to the relevant facts. We consider it imperative to have first-hand, direct access to interview prison inmates in selected cases, not for purposes of rabble-rousing, but in order to shed light on these cloudy matters of controversy with the aim of eventually working toward solutions, hopefully non-violent ones. It is for this reason above all that Freedom News is a party to this lawsuit.

I have been an editor, trainer of apprentice reporters, and staff writer for the Freedom News, of Richmond, since its beginnings in 1967. I have assisted the publisher, Mayer H. Segal, in finding out what the surrounding community is interested in reading and in attempting to meet those interests in my own reporting.

My tools have been personal research and direct investigation, for which I believe there is no substitute, and I have trained students in interview techniques. I have been closely connected with efforts in this

county to make lasting changes in the penal system and the county jail, and by that route I became acquainted first with some of the problems now connected with the state prison system.

I share with a number of other reporters the feeling that there are mysteries still connected with recent violent events, about which we shall never know the important truths until the press has access to all prisoners who may have some light to shed on these matters. I have never been an advocate of violence or engaged in any act outside the law, nor do I intend to do so now. But it is my belief that until the public has a chance to learn the truth about prisons in this state, serious injustices may be perpetuated, and violent confrontation may be in store. The role of the press is to provide full disclosure so that the public, and the decision-makers, may proceed toward a just resolution of the present impasse.

/s/ Elizabeth K. A. Segal
Elizabeth K. A. Segal

[Jurat Omitted in Printing]

[Exhibit F]

(Letterhead of Stanford University
Stanford, California 94305
Department of Communication
Redwood Hall Telephone: 415/321-2300 Ext. 4903)

David L. Grey
Assistant Professor

January 4, 1973

Richard M. Doctoroff
Patti Roberts
Law Office
558 Capp Street

I have had a chance to read and re-read carefully the Department of Corrections' definitions of news media representatives. Several comments seem very much in order.

I am writing as an individual scholar without any attempt to give the endorsement of Stanford University to these views. I am a 1957 graduate of the University of Michigan and have my doctorate in journalism and mass communication from the University of Minnesota in 1966. My degree program included extensive work in public law in political science, communication and law school courses. My dissertation studied in detail mass media coverage of the United States Supreme Court; it was published as a book in 1968 by Northwestern University Press, *The Supreme Court and the News Media.* I have taught courses in reporting of public affairs and

reporting of legal affairs and in mass communication law over seven years at Stanford and Northwestern University, 1965-present. Prior to that time and graduate work at Minnesota I was involved as a reporter and news editor for three publications, including The Wall Street Journal and as a temporary state capitol reporter for Booth Newspapers in Lansing, Michigan.

As a former working newsman, I find the definition to be much too vague and sweeping. If I were part of a press corps where it was being used, I would be among those willing to challenge it. As a scholar in the field of mass media and communication, I feel even more strongly: The wording strikes me as unfair and unconstitutional. The grounds would be vagueness and excessive arbitrariness, or so I would challenge them. I am sure part of the problem is unintentional; but whatever the causes, the situation strikes me as unsatisfactory and in need of immediate remedy.

Not only would Paul Jacobs be affected (I have read an early version of his thoughts on this matter) but also many, many other writers, indeed. Two which come to mind would be Truman Capote, *In Cold Blood,* and Howard James, *Crisis in the Courts,* the prize-winning book based on articles which first started to appear in The Christian Science Monitor. These are examples of free-lance journalism which could be seriously constrained by the definitions in paragraph 2 of the Nov. 6, 1972 Bulletin No. 72/40.

Many of the reporters accredited for the Angela Davis trial last year in Santa Clara County were

part-time correspondents for a variety of media, publications. Only constraints of numbers interferred with "accredition"; rightly avoided then (and should be now) were value judgments about what is the Established Medium. For example, would the San Francisco Bay Guardian be left out? It would seem so. Writers for more academic journals such as Science or Trans-action? These illustrations among the many possible should be enough to document the inadequacy of the present definition.

All of this depends, of course, on the willingness of inmates to be interviewed. The burden of deciding whether an interview should be granted should, in most cases, rest with the inmate in consultation with his attorney. Department officials should not be given the power to say who is or is not "acceptable" for the inmate.

All of this is based (and firmly) on the First Amendment and the public's right and need to know. I know of no policy or existing law which would support the position taken by the Department because it prevents the flow of information in a democratic society. Some of the best and most responsible and important journalism is being carried out by independent writers and documentary film and news makers. And, of course, by members of the so-called non-Establishment press—both full time and part time. If the purpose of the statement is to try to keep out such representatives from The Berkeley Barb or Tribe or its like, then the statement ought to have the courage to say so and try to defend itself against the obvious implications:

the statement is even-more-than-ever subject to formal challenge on constitutional grounds as discriminatory, biased—and restrictive of our so important and basic First Amendment rights of free speech and freedom of the press.

Put in a slightly different way, the Nov. 6 statement strikes me (again, probably in large part unintentionally) as in no way representing democracy. Apart from interest as a former newsman and scholar in the field, as simply a citizen of California I feel the statement is as repressive and inhibiting of civil liberties and the right to know as any document I have ever seen from my state government. Journalists have the mandate to help me understand where my tax dollars are being spent and what governmental priorities may be; the definition of news media representative simply restricts my access to information because, in this situation, not everyone can interview inmates and journalists of all kinds are meant under the First and Fourteenth Amendments to be my "representatives." They are no less important in this situation than legislators and others given the power of certain kinds of essential-to-democracy information-gathering. In fact, we know that they need special rights of access (where defendant's or prisoner's rights are protected) as a means of balancing and checking on our legislative, judicial and executive institutions.

Sincerely,

/s/ David L. Grey

Assistant Professor

[Exhibit G]

(Letterhead of Stanford University
Stanford, California 94305
Department of Communication

Redwood Hall Telephone: 415/321-2300 Ext. 4903)

January 12, 1973

Richard Doctoroff
588 Capp Street
San Francisco, California 94110

Dear Mr. Doctoroff:

This is in reference to the Department of Corrections' regulations stated in Administrative Bulletin 72/40. I consider those regulations to be far too restrictive.

I have worked as a journalist and have written extensively on the performance and the responsibilities of the mass media. I am attaching biographical notes that list such books as *Responsibility in Mass Communication* and *The Mass Media and Modern Society.*

I am now a part-time journalist. I write four articles a year for *The Progressive* magazine. (Several articles are cited in the attached biographical notes.) If I were to attempt to write an article that required interviews with inmates, I would be excluded.

Perhaps more to the point is the case of a close friend, Ben Bagdikian, who writes extensively on prisons. While he was assistant managing editor of *The Washington Post,* Bagdikian wrote an eight-part

series of articles that required extensive interviews with prisoners. The series was later issued as a book. Bagdikian is now a free-lance writer. He is writing another book on prisons. The regulations exclude him.

It must be obvious that the regulations are unduly restrictive. Although I am aware that regulations are necessary, those too closely drawn fail to serve the prison system, the prisoners, the media, and, worst of all, a public that must be informed.

Sincerely,
/s/ William L. Rivers
William L. Rivers
Professor

WLR:csn
enclosure

William L. Rivers
Department of Communication
Stanford University
Stanford, California 94305
Telephone: 321-2300, Ext. 4903

665 Alvarado Row
Stanford, California
Telephone: 326-8355

BIOGRAPHICAL NOTES (January, 1972)

Born March 17, 1925, Gainesville, Florida. Served in the U.S. Marine Corps, 1943-1946.
Married: two daughters, 20 and 17

Education

BA (1951) and MA (1952) degrees from Louisiana State University Ph.D. (1960) in political science from American University, Washington, D.C.

(Dissertation: "The Washington Correspondents and Government Information")

Fellowships and Awards

American Political Science Association Congressional Fellowship; 1954-1955

NATO Fellowship for Oxford Seminar on International Organizations; summer, 1956

Southern Fellowships Fund grant to further Ph.D. study; summer, 1956

World Affairs Fellowship, University of Denver; summer, 1957

Leadership Training Awards in the Mass Media (Ford) grant; 1958-1959

Distinguished Teaching Award, University of Texas, 1962

Sigma Delta Chi Distinguished Research Award for *The Opinionmakers;* 1966

Mellett Fund Award for press council experiments, 1967 and 1968

Consultantships and Special Research

Consultant to the Education Program of the Ford Foundation; summer, 1960

Interviewer for "Federal Political Executives" study, Brookings Institution; 1960

NATO Fellowship for research in Western Europe; summer, 1963

Consultant, (A.I.D.) research in East Africa; summer, 1964

Consultant, the RAND Corporation, for mass media studies; 1968-1969

Consultant, the Twentieth Century Fund; 1969-1970

Teaching Experience

Louisiana State University; 1953-1954

University of Miami (Florida); 1955-1958

University of Texas; 1959-1960 and 1961-1962

Department of Communication, Stanford University, September 1962-present

Professional Experience

Fulltime

Washington Correspondent, *The Reporter;* 1960-1961

Reporter, editorial writer, and relief city, wire, and Sunday editor, *Morning Advocate,* Baton Rouge, Louisiana; 1954

Reporter and editorial columnist, *News-Herald,* Panama City, Fla.; 1952-1953

Reporter and editorial writer, *State-Times,* Baton Rouge, La.; 1950-1952

Part-time

Media Columnist, *The Progressive* magazine; September, 1971-present

Election Manager and News Analyst, Network Election Service (three networks and two wire services); 1964 and 1966

Election Analyst, NBC News; 1960 and 1962

Florida correspondent, Kiplinger Letters, Miami, Florida; 1958

Publications

Books

Backtalk: Press Councils in America (with three co-authors), Canfield Press; February, 1972

Free-lancer and Staff Writer: Writing Articles for Magazines, Rinehart Press; January 1972

A Region's Press: Anatomy of the Newspapers in the San Francisco Bay Area (with David M. Rubin); Institute of Governmental Studies, University of California, Berkeley; 1971

The Adversaries: Politics and the Press, Beacon Press; 1970

Responsibility in Mass Communication (with Wilbur Schramm); Harper & Row; 1969

"The Press and the Assassination," in *The Kennedy Assassination and the American Public* (Greenberg, Bradley, and Edwin Parker, eds.); Stanford University Press; 1965

The Mass Media and Modern Society (co-author with Theodore Peterson and Jay Jensen), Holt, Rinehart & Winston; 1965 and (second edition) 1971.

The Opinionmakers, Beacon Press; 1965

The Mass Media: Reporting, Writing, Editing, Harper & Row; 1964

Articles

"The New Confusion," *The Progressive;* December, 1971

"Who Shall Guard the Guards," *The Progressive;* September, 1971

"Notes from Underground," *Columbia Journalism Review:* Spring, 1971

"Underground Appeal," *The Progressive;* February, 1971

"The Journalism Schools: The Media as Teacher," *Change, The Magazine of Higher Education;* March-April, 1971

"The 'Chronicle:' Schizophrenia by the Bay" (with David M. Rubin), *Columbia Journalism Review:* Fall, 1969

"California's Press: New Winds in the South, New Splash in the North," *Saturday Review;* September 23, 1967

"Jim Crow Journalism," *Stanford Today;* Autumn, 1967

"The Washington Correspondents After 25 Years," *Columbia Journalism Review;* Spring, 1962

"The Gonzales Victory," *The Reporter;* November 11, 1961

"The Foreign Policy of John J. Rooney," *The Reporter;* June 22, 1961

"The Politics of Pollution," *The Reporter;* March 30, 1961

"The Businesslike Mr. Hoffa," *The Reporter;* February 2, 1961

"Segregation Costs Money," *The Reporter;* December 8, 1960

"The Margin of Victory," *The Reporter;* October 27, 1960

"Brann the Iconoclast," *History III;* September, 1960

"Paradise on the Installment Plan," *The Reporter;* October 15, 1959

"The Long, Long Trail," *The Reporter;* July 21, 1959

"Congress Still Has Its Wits," *The New York Times Magazine;* May 17, 1959

"On the Shifting Sands of Miami Beach," *The Reporter;* December 25 1958

"William Cowper Brann and His 'Iconoclast'," *Journalism Quarterly;* Fall, 1958

"The Triumph of Trivia," *Nieman Reports;* July, 1958

"The Fine Art of Moderation," *The Nation;* December 21, 1957

"Common Market: The American Stake," *The Nation;* May, 1957

"Europe's Common Market," *The Nation;* January 19, 1957

"Why Congressmen Can't Do Their Jobs," *This Week;* January, 1956

"Florida: The State with the Two-way Stretch," *Harpers;* February, 1955

(Other articles in *The Reporter, Public Opinion Quarterly, The Progressive, Writer's Digest, Reader's Digest, Buick Magazine, Ford Times,* and *The Diplomat*)

[Exhibit H]

(Letterhead of
Office of the Director of
Psychiatry (Prison Health Services)
Health Services Administration
377 Broadway - Room 302
New York, New York 10013
566-4828, 4829, 4909)

Frank Rundle, M.D.
Acting Director

December 26, 1972

Richard Doctoroff, Esq.
558 Capp Street
San Francisco, California 94110

Dear Mr. Doctoroff:

My attention was recently directed to the recently issued administrative orders of the California Department of Corrections, designed to regulate interviews of inmates by news media representatives. In particular, I am concerned about the order prohibiting interviews with any inmate adjudged to be "psychotic".

Based upon my expertise as a board certified psychiatrist and my experience as Chief Psychiatrist at

the California Correctional Facility, Soledad, California and my knowledge of the California Corrections Department and Correctional Institutions in general, I would like to register my objection to such a procedure.

1. The term "psychotic" is imprecise which would allow its application broadly.

2. The decision as to whether an inmate is "psychotic" presumably would be made by the psychiatrists within the Corrections Department who by and large place institutions needs above those of individuals. Also, they are subject to pressures from custodial personnel to use psychiatric procedures for custodial ends.

3. There is no logical reason to discriminate against the "psychotic" inmate in this manner. The only conceivable logical reason would be that an interview with a news media representative would be harmful to the inmate and that the inmate would not have the mental capacity to recognize the danger. I am unable to imagine circumstances in which the above hypothetical reason could apply. In fact, I would say that an interview with an interested person whether news media representative or not would have a beneficial effect upon any inmate, whether "psychotic" or not, since it would at least for a brief time offset the psychologically devastating effect of isolation from the community which is imposed by prison.

If I can be of any assistance in your efforts to protect the rights and interests of the most helpless

of the helpless, the mentally ill prison inmate, please call upon me.

Sincerely yours,
/s/ Frank L. Rundle, M.D.
Frank L. Rundle, M.D.
Acting Director
Prison Mental Health Services
Health Services Administration

[Exhibit I]

[Visiting Privileges, November 1, 1972, which are Printed *supra* at pages 100-104, Omitted in Printing]

[Exhibit J]

[The Opinion in *Washington Post Co. v. Kleindienst,* which is now Reported at 357 F.Supp. 779, Omitted in Printing]

[Exhibit K]

[The Order in *Washington Post Co. v. Kleindienst,* which is now Reported at 447 F.2d 1168, Omitted in Printing]

[Exhibit L]

[Title Page Omitted in Printing]

Research Report No. 46

Explorations in Inmate-Family Relationships

Norman Holt
Associate Social Research Analyst
Southern Conservation Center

Donald Miller
Associate Social Research Analyst
Los Angeles Research Unit
Research Division
California Department of Corrections
Sacramento, California

January 1972

SUMMARY

Some Conclusions and Implications

The central finding of this research is the strong and consistent positive relationship that exists between parole success and maintaining strong family ties while in prison.

Only 50 percent of the "no contact" inmates completed their first year on parole without being arrested, while 70 percent of those with three visitors were "arrest free" during this period. In addition,

the "loners" were six times more likely to wind up back in prison during the first year (12 percent returned compared to 2 percent for those with three or more visitors).

For all Base Expectancy levels, we found that those who maintained closer ties performed more satisfactorily on parole.

This suggests that it might be well to view the inmate's family as the prime treatment agent and family contacts as a major correctional technique. This approach has numerous advantages not the least of which is that it's free. It wouldn't require the specially trained staff or costly staff augmentations so common to most treatment approaches.

A second major advantage is the built-in inmate motivation. Most treatment techniques have limited value because the inmates most in need are also the least motivated for treatment. Motivation for visits is consistently high.

There are two areas in which changes might increase correctional effectiveness through promoting strong family ties. First, there are several ways in which special programs could become more effective. Most extensive use should be made of temporary releases. Their potential seems almost unlimited. Temporary releases should be used as pre-release preparation throughout the entire period of incarceration. Home leaves beginning a few months after reception would go a long way toward promoting strong family ties. Home visit privileges should be extended to a few non-violent, married prisoners in low risk categories

on an experimental basis and slowly be granted to other groups.

The Family Visit Program should be reserved strictly for those inmates who cannot make use of temporary releases. These would probably include such cases as chronic parole absconders, perpetrators of very violent crimes such as murder, or inmates who need to work out marital problems in a more structured setting than is provided by the home. Since common-law marriages are increasing in prevalence, those of some duration should be recognized in both programs.

Family counseling should be utilized more with each institution required to have at least one person as a State-certified family counselor who would be designated as the coordinator for the program.

The second area concerns routine institutional procedures. The further visitors have to travel and the more difficult the procedures, the more likely are the visitors to reduce contacts as the sentence is served. Thus, every effort must be made to place the inmate in the institution closest to his home in order to facilitate family contacts. This research has shown the high cost in terms of parole failure of interfering with important social ties. Correctional systems can no longer afford to incarcerate inmates in areas so remote from their home communities as to make visiting virtually impossible. Proximity to the inmate's home should be the first consideration in making assignments to institutions.

All correctional institutions in California, like most institutions throughout the world, make arrangements for inmates to visit and correspond with their family

and friends. Although such arrangements have existed since the beginning of prisons in this state, little systematic information is available about the nature and consequences of these outside contacts. This research project was undertaken as an exploratory study of the effects of these contacts on the inmate in prison and later on parole. The data for this study were obtained from inmate files at the Southern Conservation Center. The question was also raised of the effects of the Family Visiting and Temporary Release Programs at the California Correctional Institution. Some general information on marital status and patterns of outside contact is presented in the report as an introduction to the discussion of the influence of these contacts on the individual as inmate and as parolee.

Summary of Findings

- *Prisoners are less likely to be married than the average male.*
- *Patterns of outside contacts reflect the differences in family structure of different Ethnic groups.*
- *In general, contacts with family and friends do not necessarily decrease as the time is served. Marital ties are an exception, however.*

  Contacts with legally married wives of first term inmates grew fewer through the second year, suggesting that the marital relationship erodes as the years in prison pass.

  Given what appears to be a major deterioration of marriages after the first and second year of prison (about one-fourth fewer of the wives were

still visiting after three or more years), it is surprising that a hard core of wives continues the same level of contacts through four years plus and on into the second or third prison term.

- *Frequent visits don't seem to improve the inmate's institutional behavior but do lead to better parole plans and a better chance of being paroled.*
- *Inmates who maintained frequent outside contacts while in prison did significantly better on parole.*

A twelce-month parole follow-up study of 412 men paroled from the Southern Conservation Center in 1968-69 revealed that men with more people visiting them during their last 12 months in prison experienced significantly less difficulty and less serious difficulty in their first year of parole than did those with fewer visitors.

Men who had more people visiting them in prison experienced fewer difficulties on parole regardless of Base Expectancy Score. However, in the lower score range (00-32), the difference was small, and the Base Expectancy measure seemed more predictive of outcome for those with more numerous visitors.

- *Family Visiting and the Temporary Release Programs were strongly supported by the inmate body with no hint of negative reactions from those who couldn't participate.*

All restrictions on visitors and mail should be closely scrutinized with an eye to eliminating all regulations

whose purpose is other than protecting the absolute basic security of the institution. No restriction should be allowed to remain the only reason for which is the lack of space. Space must be found. The effectiveness of family contacts is such that very high priority should be given to finding space that may be utilized to increase the frequency of family contacts.

Chapter VIII. The Inmate and His Family: Some Conclusions and Implications

Any serious look at the end results of correctional programs is likely to be discouraging. Immediately the investigator faces the problem of trying to define "correctional programs," as the term has become so broad as to include almost everything convicted criminals are required to do in the course of their imprisonment. A second difficulty is the virtual absence of any theoretical basis for the programs. After a review of current correctional techniques, Cressey concluded that not only had their effectiveness not been demonstrated but that the techniques were "only vaguely related to any reputable theory of behavior or of criminality."[1] Empey observed that most such programs, rather than being derived from theoretical constructs, are usually based on an "intuitive opportunism," involving a kind of goal-oriented guessing which develops into a strategy of activity.[2]

---

[1]Cressey, D.R., "The Nature and Effectiveness of Correctional Techniques," *Law and Contemporary Problems*, Vol. 23, No. 4, Autumn 1958.

[2]Empey, L.T., "A Strategy of Search," paper presented at the planning session of the Pacific Sociological Association on the Technical and Ethical Problems Involved in Evaluating Action Programs, Salt Lake City, April 1965.

A third area of frustration involves the inability to find empirical evidence showing any significant value for the great majority of current techniques of correctional intervention.[3] Commenting on this lack of demonstrated effectiveness, Ward remarked:

> "University investigators should find little comfort in the fact that while treatment evaluation results are not much to take to the legislature, the implications for the sociological and psychological theories underlying these programs are not much to take to their professional meetings. With the investment that all parties—prison and parole departments, treatment specialists and theoreticians—have in evaluations of correctional programs, there is no question that what would be helpful to all concerned, including the objects of treatment, would be the report of a prison treatment program that really worked."[4]

At this point in our knowledge it seems fair to say that there are few correctional techniques whose proven value is such that their application would represent a significant improvement over doing nothing at all. To compound the difficulty most of these unproven techniques require high staff ratios or in some other ways consume large amounts of scarce correctional resources. It is against this bleak backdrop that the implications for corrections of the find-

---

[3]Robison, J. and G. Smith, "The Effectiveness of Correctional Programs," *Crime and Delinquency*, Vol. 17, No. 1, January 1971.

[4]Ward, D.A., "Evaluation of Correctional Treatment: Some Implications of Negative Findings," paper read at the First National Symposium on Law Enforcement Science and Technology, Chicago, Illinois, March 1967.

ings of this study relating to inmate social ties will be discussed.

Do Family Contacts Increase Parole Success?

The central finding of this research is the discovery of a strong and consistently positive relationship between parole success and the maintenance of strong family ties while in prison. The reliability of this finding is substantiated by the results of other research undertakings. The earlier of these efforts was conducted by Lloyd Ohlin in the course of developing a parole success prediction scale for Illinois. Ohlin developed an index of family interest while in prison to capitalize on the belief of many parole agents that parolees with closer family ties tended to do better. Using a sample of releases from 1925-35, he found that 75% of the inmates classified as maintaining "active family interest" while in prison were successful on parole compared to only 34% for those regarded as loners.[5] Glaser used Ohlin's classification technique with a sample of 1956 releases from federal prisons with very similar results. He found that 71% of the "active family interest" group were successful compared to only 50% of the "no contact with relatives" group.[6] In an earlier study of 1940-49 releases from the Pontiac Branch of the Illinois State Penitentiary, which has a reformatory type population, Glaser found a 74% success rate for the "active inter-

[5]Ohlin, L.E., *The Stability and Validity of Parole Experience Tables*, (Ph.D. dissertation) University of Chicago, 1954, cited in Glaser, D., *The Effectiveness of a Prison and Parole System*, Bobbs-Merrill, Inc., New York, 1964, p. 366.

[6]Glaser, op. cit., p. 366.

est" group and a 43% rate for those parolees without contacts.[7]

This study found very similar percentage differences between groups. Only 50% of the "no contact" inmates completed their first year on parole without being arrested, while 70% of those with three visitors were "arrest free" during this period. In addition the "loners" were six times more likely to be returned to prison during the first year (12% returned compared to 2% for those with three or more visitors). The convergence of these studies should be emphasized. Ohlin's study focused on inmates paroled in Illinois over a ten-year period. Glaser's work replicated Ohlin's findings with releases during one year from federal prisons as well as from a reformatory type population. The same results characterize our study's sample of 1969-70 releases from a minimum security institution in California. The positive relationship between strength of social ties and success on parole has held up for 45 years of releases across very diverse offender populations and in different localities. It is doubtful if there is any other research finding in the field of corrections which can approximate this record.

One of the major problems with the earlier studies, which the authors of this study tried to overcome, was the strong interrelationship among social ties, other important variables, and parole outcome. The unique contributions of this study in this regard was to show

[7]Ibid.

the independent contribution of family ties to parole outcome. The importance of family ties held up in an analysis in which six other important factors were considered.

Glaser postulated that the amount of release money was important to parole outcome.[8] We found this to be true only for those with few social ties. Difficulty on parole is somewhat predictable if the inmate has few contacts and less money. On the other hand, strong social ties appear to serve as an alternative material resource. Among those with many visitors the amount of release money assumed no importance. Among federal prisoners Glaser also found significant differences in parole outcome associated with differences in type of residence. However, similar differences in California largely disappeared when the number of social ties was held constant. There was not much difference in parole outcome among parolees planning different types of residences who received numerous visitors. The relationship didn't disappear entirely, however, since those parolees planning to live with parents or wives still had a slight advantage in parole success. For example, 8% of those who had two or more visitors and who were living alone on parole recidivated compared to 5% of their counterparts with plans to live with their parents or wives.

Similarly, employment prospects among federal prisoners were important to parole outcome, but with the

[8]Glaser, op. cit., p. 316.

imposition of a control for family contact, job offers were not important for the sample used in the present study. The importance of a job offer appeared to be primarily a function of the strength of the inmate's social ties. In other words, the presence of a job offer was unrelated to parole outcome when the inmate's social ties were taken into account, and the effects of social ties on parole success were independent of a job offer.

An alternative explanation of the findings of this study is that inmates receiving more visitors are less likely to recidivate anyway. In order to test this hypothesis, the authors divided the sample into three levels of predicted parole outcome and compared social ties and parole success within each. The predictive device was the California Base Expectancy Scale, which is based heavily on past criminal involvement. Within all Base Expectancy levels, it was found that those who maintained closer ties did better.

It might be claimed that, while other important variables were taken into account, inmates motivated to maintain strong social ties have some special motivation to succeed on parole. The same qualities which motivated the inmate to maintain frequent family contacts might have caused him to do better on parole. The data in Chapter V seem to invalidate this alternative explanation. If the results in parole outcome were caused by differential motivation, it would be necessary to hypothesize a somewhat generalized motivational difference. In other words, the difference in motivation ought to show up in other areas besides

visiting and parole outcome. However, this was not the case. Those who maintained frequent family contacts received about as many disciplinary reports, had no better work records, were no more likely to participate in treatment programs, and did about the same in group counseling. In summary, all the evidence suggests that there is a strong independent, positive relationship between maintaining frequent family contacts while in prison and success on parole. This evidence suggests that the inmate's family should be viewed as the prime treatment agent and family contacts as a major correctional technique. This approach has numerous advantages not the least of which is that it is free. It doesn't require the specially trained staff or costly staff augmentations so common to most treatment approaches.

A second major advantage is the built-in inmate motivation. Most treatment techniques, even if they work, have limited value because the inmates most in need are also the least motivated for treatment. The few who volunteer are often the same ones who would succeed without the program. The desire for outside contacts, by contrast, is a central part of the inmate's existence. The data in Chapter IV clearly show that when adequate opportunity is provided for contacts the inmate's social ties need not erode away. The contacts of our sample were about as frequent after several years of incarceration as during the first six months. The one important exception to this was that a significant number of wives stopped visiting during the second year. It is necessary to emphasize, how-

ever, that this study was done at a correctional complex which is located within easy commuting distance from where most of the inmates' families live and which has very liberal arrangements for visiting. It seems apparent that the further visitors have to travel and the more difficult the procedures for visiting, the more likely are the visitors to reduce contacts as the sentence is served.

Can Correctional Systems Help?

The next question is whether or not correctional systems can do anything to capitalize on the family's potential as a treatment agent. Chapter VII examined two experimental programs which aimed in this direction, the Family Visiting and the Temporary Release Programs. Both efforts are successful by almost any standard. Both enjoyed almost unanimous support from the inmate body. Almost all inmates hoped to participate, and those who couldn't were not resentful. Neither presented serious administrative problems. In addition, a follow-up study found that the participants in either program did better on parole than non-participants. Sixty percent of the participants experienced no difficulty during the first year of parole compared to only 42% of the non-participants. The number of participants was small, and the results must be interpreted with caution. However, the findings held up under the application of numerous control variables.

A final question about the temporary releases is whether they seriously threaten the public safety. Cur-

rently, thousands of inmates in California are being released each year on temporary leaves and experience has shown that they are involved in no more difficulty than would normally be expected during the first few days on parole.

Some Recommendations

There are two areas in which changes might increase correctional effectiveness through promoting strong family ties. First, there are several ways in which special programs could become more effective. More extensive use should be made of temporary releases. Their potential seems almost unlimited. Even with their rapidly expanding use in California, no limits have yet been found on who can benefit or the number of times benefit can be derived. The use of temporary releases as pre-release preparation should be extended to include the entire time of incarceration. Home leaves beginning a few months after reception would go a long way toward promoting strong family ties. Home visit privileges should be granted to a few non-violent, married prisoners in low risk categories on an experimental basis and slowly be extended to other groups.

The Family Visiting Program should be reserved strictly for those inmates who cannot make use of temporary releases. These would probably include such causes as chronic parole absconders, perpetrators of very violent crimes such as murder, or inmates who need to work out marital problems in a more structured setting than is provided by the home. Since

common-law marriages are increasing in prevalence, those of some duration should be recognized in both programs.

Family counseling should be utilized more with each institution required to have at least one person certified as a family counselor who would be designated as a coordinator. This person would be available as a co-leader for family groups as well as a consultant to other staff. This individual's availability should be made known to visitors so as to encourage their consultation with him.

The second area concerns routine institutional procedures. Every effort must be made to place the inmate in the institution closest to his home in order to facilitate family contacts. This research has shown the high cost in terms of parole failure of hindering important social ties. Correctional systems can no longer afford the expense of incarcerating inmates in areas so remote from their home communities as to make visiting virtually impossible. Proximity to the home community should be the first consideration in making assignments to institutions.

All restrictions on visitors and mail should be closely scrutinized with the objective of eliminating all regulations which are not necessary to promoting the absolute basic security of the institution. No restriction should be allowed to remain whose only reason is the limit in space. Space must be found. If some new correctional technique were invented tomorrow whose effectiveness were equal to family contacts,

there would be a rush to find space for implementation even if it meant using the warden's office. Wherever possible visitors should be allowed to bring a lunch and share it with the inmate. This avoids terminating the visit for the meal and also provides for visiting in a setting focused on a central family ritual. There are undoubtedly many other ways in which family contacts could be promoted.

Exhibit M

(Letterhead of State of California
Health & Welfare Agency)

Department of Corrections
California State Prison
San Quentin, California 94964
Ronald Reagan, Governor

January 12, 1973

Re: Hillery, Booker T.
A-32262

Mr. Mark Schwartz
2509 Dana Street
Berkeley, Ca. 94704

Dear Mr. Schwartz:

I just received your request to interview Mr. Hillery and am replying to same. In order to comply with your request we will require that you:

1. Please bring with you Mr. Hillery's request for interview so that we may verify that it is a valid request.

2. Your original visit with Mr. Duren in the visiting room was a courtesy on our part. We cannot, on an on-going basis, utilize the space set aside for family and friends to accomplish press interviews. It will therefore be necessary for you to reimburse the state for an escort officer to escort you into the institution and offer custodial supervision during the interview at a cost of $44.00.

Please advise me of your decision based on the above and I will then process your request.

Sincerely yours,
L. S. Nelson, Warden.

/s/ Lee E. DeBord
Lee E. DeBord
Information Officer

LED:ajr
[Certificate of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed Feb. 7, 1973]

[Caption Omitted in Printing]

DEFENDANTS' SUPPLEMENTAL MEMORANDUM

Preliminary Statement

There is no doubt that the area of prison administration is extremely complex and, at the present moment in history, controversial. Experts do take

different viewpoints on the question of inmate interviews. California, however, entrusted the management of its prisons to the expert judgment of the Department of Corrections, and it is not the function of courts to substitute their judgment on questions of prison management for that of the prison officials charged by law with the responsibility for prison management.

In short, plaintiffs' disagreement with the expert judgment of the Department of Corrections does not render the Department's rules unconstitutional. On the contrary, the Supreme Court's recent decision in *Branzburg v. Hayes,* 408 U.S. 665, and other decisions and principles discussed below, demonstate that the Department's valid exercise of its authority to administer prisons does not "abridge" the "freedom of speech" of state inmates.

Argument

The Department of Corrections in Prohibiting News Representatives from Conducting Personal and Individual Interviews With Particular Prison Inmates, Does Not "Abridge" the Free Speech or Other First Amendment Rights of Inmates.

There is also no merit in the claim of the inmate-plaintiffs that the Department "abridges" their "freedom of speech" and other First Amendment rights. Inmates, of course, retain constitutional rights, but it is equally axiomatic that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retrac-

tion justified by the considerations underlying our penal system." *Price v. Johnston,* 334 U.S. 266, 285 (1948). This axiomatic proposition has been uniformly applied by federal courts to uphold restrictions upon the activities of prisoners which, if they were free men, would enjoy constitutional protection. *Stroud v. Swope,* 187 F.2d 850 (9th Cir. 1961), *cert. denied,* 342 U.S. 829 (denial of right to engage in outside business activities); *Numer v. Miller,* 165 F.2d 986 (9th Cir. 1948) (denial of access to college correspondence course); *Sherman v. Meier,* 462 F.2d 609 (9th Cir. 1972) (denial of right of inmates to determine own hairstyle); *Caldera v. Mitchell,* Ninth Circuit No. 24838, order of affirmance January 8, 1970, *cert. denied,* 399 U.S. 930 (denial of right of prisoners to be married to each other); *Lee v. Tahash,* 352 F.2d 970 (8th Cir. 1965) (control of prisoners' mail); *McCloskey v. Maryland,* 337 F.2d 72 (4th Cir. 1964) (control of prisoners' mail); *Vida v. Cage,* 385 F.2d 408 (6th Cir. 1967) (restriction of inmate's communications with other prisoners); *McDonough v. Director of Patuxent,* 429 F.2d 1189 (4th Cir. 1970) (denial of correspondence with magazine and other outsiders for purpose of criticism of institution); *Sostre v. McGinnis,* 442 F.2d 178, 199-200 (2d Cir. 1971) (en banc), *cert. denied,* 405 U.S. 978 (control of prisoners' mail).

In particular, the federal courts have recognized that an inmate's communications with the outside world may be restricted in order to maintain prison discipline, and that the inmate's free speech and other

First Amendment rights are not violated by such prison regulations. As stated by the Second Circuit, *en banc,* in *Sostre v. McGinnis, supra,* 442 F.2d at 200: "Discipline and prison order are sufficient interests to justify such regulation incidental to the prisoners' speech." *See also, McDonough v. Director of Patuxent, supra,* 429 F.2d 1189, 1193 (4th Cir. 1967) (upholding prohibition of inmate's correspondence with national magazine and others to prevent adverse effect on "institutional control and discipline").

The foregoing principles mandate the rejection of the inmates' First Amendment contentions. The decision of the Department to prohibit particular inmates from granting individual interviews to the press is based upon the Department's determination that such a ban is necessary to maintain the discipline, custody and control of prisons, and such prohibition on individual interviews constitutes an appropriate exercise of its broad regulatory powers. As the Ninth Circuit declared in *Smith v. Schneckloth,* 414 F.2d 680, 681 (9th Cir. 1969):

> "It is . . . settled . . . that correctional authorties have wide discretion in matters of internal prison administration and that reasonable action within the scope of this discretion does not violate a prisoner's constitutional rights."

The lack of merit in plaintiff's First Amendment claims is independently demonstrated by the fact that the Department of Corrections permits the written communication of inmate grievances, complaints and stories to the press. In view of this system of reason-

able access to the press, the Department's denial of one particular means of communication, namely, individual interviews with news representatives, does not "abridge" the "freedom of speech" or other First Amendment rights of inmates. *See also Smith v. Bounds,* Civ. No. 2914, E.D.No.Car., opinion dated March 14, 1972, where the district court upheld against a suit by inmates, a state prison rule barring inmate interviews with the press, noting (opinion, pp. 4-5: R. 389-390):

> "In light of the mail regulations of the North Carolina Department of Corrections, it appears that inmates have been provided with sufficient opportunity to correspond with the members of the media and to present their views to the public. In the light of such opportunity, it is not necessary that personal interviews must also be permitted."

There is no merit in plaintiffs' claim that the Department's rule is overly broad. Communications between prisoners and the press are not barred; it prohibits only direct individual press interviews with particular inmates. In view of the need to maintain prison discipline and order, this narrow restriction is not a constitutionally prohibited abridgement of First Amendment rights. *See Cox v. Louisiana,* 379 U.S. at 566, where the Supreme Court sustained a state's total ban on picketing near a courthouse when that ban expressed a legislative judgment—comparable to the judgment of prison officials in the instant case—"that such conduct inherently threatens the judicial process."

As the Supreme Court held in *Kovacs v. Cooper,* 336 U.S. 77, 88-89 (1949):

> "That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open. Section 4 of the ordinance bars sound trucks from broadcasting in a loud and raucous manner on the streets. There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers. We think that the need for reasonable protection in the home or business houses from the distracting noises of vehicle equipped with such sound amplifying devices justifies the ordinance."

See also Breard v. Alexandria, 341 U.S. 622, 644 (1951), where the Supreme Court held that free speech and free press were not "abridged" by an ordinance barring door to door soliciting notwithstanding a publisher's claim of a "right to distribute publications in the precise way that those soliciting for him think brings the best result." *Cf. Johnson v. Avery,* 393 U.S. 483 (1969) (recognizing that an appropriate system of alternative assistance to inmates would justify prison rules barring inmates from acting as writ-writers). *See also Lloyd Corp. v. Tanner,* 407 U.S. 551, 567 (1972), where the Supreme Court upheld a ban against distribution of handbills in the interior mall area of a large privately owned shopping center, noting that, "It would be an unwarranted in-

fringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist."

Dated: February 6, 1973.

Evelle J. Younger
Attorney General of the State of California
Edward A. Hinz, Jr.
Chief Assistant Attorney General-
Criminal Division
Doris H. Maier
Assistant Attorney General-Writs Section
Edward P. O'Brien
Assistant Attorney General

/s/ John T. Murphy
Deputy Attorney General
Attorneys for Defendants

[Declaration of Service Omitted in Printing]

Volume 2 Pages 76 Through 155

In the United States District Court
Northern District of California

Before: Honorable Spencer M. Williams, Judge
Honorable O. D. Hamlin, Judge
Honorable William G. East, Judge

[Caption Omitted in Printing]

REPORTER'S TRANSCRIPT

February 14, 1973

Reported by:
William R. Johnston

Appearances:

For Plaintiffs:

Richard M. Doctoroff, Esq.
Patti Roberts, Esq.
Attorneys at Law
558 Capp Street
San Francisco, California

For Defendants:

John T. Murphy, Esq.
Deputy Attorney General
State of California
6000 State Building
San Francisco, California 94102

In Amicus Curiae:

Peter Sheehan, Esq.

[76] *Wednesday, February 14, 1973*

The Clerk: Hillery versus Department of Corrections.

Case No. C 71-2150, Brooker T. Hillery versus California Department of Corrections.

Counsel, state your appearances, please.

Mr. Murphy: John Murphy, Deputy California Attorney General, appearing for the defendant, Your Honor.

Ms. Roberts: Patti Roberts and Richard Doctoroff, appearing for the plaintiffs.

Peter Sheehan is here as amicus curiae.

Eve Pell, one of the plaintiffs is sitting at counsel table.

Mr. Sheehan would like to approach the bench initially.

Judge Williams: How do you spell your last name, sir?

Mr. Sheehan: S-h-e-e-h-a-n.

Your Honor, I am appearing on behalf of a number of representatives of the press. We filed an amicus curiae brief with this Court.

Judge Williams: I allowed that to be lodged.

I guess the Attorney General received a copy last Thursday, is that correct?

Mr. Murphy: Yes, Your Honor.

[77] I received it on Friday.

Judge Williams: I know that Monday was a holiday for the State.

Have you any objection to allowing the AC to argue this matter as long as you have an opportunity to file any responses?

Mr. Murphy: No objection to the filing of the brief or any argument which the AC wishes to make.

I would like an opportunity, if it pleases the Court, to file points and authorities in opposition to the memoranda. I believe all that would be necessary, as far as time would be ten days.

Judge Williams: All right.

Then we will allow the filing of this memo which has previously been lodged with this Court. We will

allow Mr. Sheehan to argue the matter and we will permit the State of California ten days in which to file points and authorities.

Mr. Sheehan: Thank you, Your Honor.

I will not be arguing the matter. It has been divided up into segments. It's going to be argued by one of the plaintiffs' counsel. Thank you, Your Honor.

Judge Williams: Ms. Roberts?

Ms. Roberts: Yes.

The case before the Court this morning raises the important competing public interests of the right of the [78] public to know and the concomitant right of the free and open dissemination of gathering of the news. This right, we understand, is correlative to the right of prisoners' freedom of speech.

The issue here is raised in the context of a Department of Corrections administrative manual rule, Section 415.07, which bans all press interviews with specifically designated prisoners in California prisons.

Judge Williams: Excuse me, Ms. Roberts.

Do you intend to argue these two points separately —the freedom of the press issue and the freedom of the speech issue?

Ms. Roberts: Yes.

I will be covering the freedom of the press issue and Mr. Doctoroff will be covering the issue of the freedom of the First Amendment as applied to prisoners.

Judge Williams: Thank you.

Mr. Doctoroff: Possibly, at the outset we might, for the record, delineate what is before the Court at this time.

My understanding is that this Court has before it the motion of the defendant to dismiss the complaint and also the motion of the plaintiffs for a preliminary injunction. I believe that is what is before the Court.

Judge Williams: Yes.

[79] We are covering the regulation, which was the subject of the initial suit, and we do not intend to get into the matter of the interim regulations today.

Mr. Doctoroff: That is my understanding.

Ms. Roberts: That is my understanding as well.

Initially, on September 28th, Judge Williams issued a preliminary injunction which declared that this administrative regulation was unconstitutional on the grounds that prisoners did have a First Amendment right and they did have a right to speak to authorized representatives of the press and the media.

The order was vacated due to jurisdictional grounds approximately one month after that and transformed into a temporary restraining order.

This happened when it became clear that the defendants' regulation was statewide and covered all California prison institutions and was not confined merely to San Quentin.

The interim regulations have been proposed by the Department and are now presently being discussed before Judge Williams. Certain of them are being applied within the prison complex.

While it is clear that conditions of confinement must be different than on the streets, that the prisons must be different than what we see outside, that the

prison administrators must be given a latitude in the administration [80] of internal affiairs of prisons, we also must recognize the right of prisoners' constitutional rights and that includes First Amendment.

This has been confirmed by the United States Supreme Court and by Federal authorities throughout the country. In Koffman v. Rightguard, the Court said:

> "A prisoner attains all the rights of an ordinary citizen except those expressly or by necessary implication taken by law."

We feel that the refusal of the Department of Corrections to allow press and media persons to interview prisoners restricts the important right of the public's right to know. We stress that it is the public's interest here that is at stake. It is not the stake of an individual newspaper person.

It's basic to a democratic system and our country's scheme of government that the people, the public have full knowledge of information and issues. The only way that this is possible in a complex society is through the press, as one of the most important ways, perhaps not the only way.

For the public to be making decisions on such important issues as crime and prison administration in the general context without adequate information makes that right, the public's right to govern, somewhat of a sham.

The press, we feel, in this role of supplier and [81] gathering and analyzing information serves what is a quasi-official role as a representative of the public.

In the United States Supreme Court in 1935 in the case of Brosaun v. American Press Co. the Court said:

> "The predominant purpose of the First Amendment was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and journals of the country have shed and continue to shed more light on the public and business affairs of the nation than any other instrumentality of publicity. And since an informed public opinion is the most potent of all restraints and misgovernment, the suppression or arrangement of the publicity afforded by the free press cannot be regarded other than with grave concern."

We feel that refusing to allow authorized and designated members of the press and the media entrance in to see prisoners at our prisons under appropriate security provisions would be a trammel on those important constitutional rights.

We have seen in recent years that prisons are a special concern. All people are worried about crime, rich people or poor people, whether it is people in the cities or in the country. The social and psychic costs of crime are certainly beyond calculation and the problem seems to be increasing.

[82] Prisons are the last step of the criminal justice system and in effect all Californians. Right now in California there are over 25,000 people confined in California's prisons. There are over 13 major institutions in California.

Judge Williams: I thought it was about 20,000 now.

Ms. Roberts: I think recently some of those statistics are going up. It is somewhere between 20 and 30, I believe.

There are also an increasing number of people who are paroled from those institutions. There are many camps and other facilities that these regulations would apply to, including those men on work furlough, and women, too.

It is important that the public be informed and the public deal with these problems.

Chief Justice Warren Burger has said:

> "When a sheriff or a marshal takes a man from a courthouse into a prison van and transports him to confinement for two to three to ten years, this is our act. We have tolled the bell for him and whether we like it or not, we have made him our collective responsibility. We are free to do something about him. He is not. This is the public's obligation to deal with this situation."

The Chief Justice has also repeatedly spoken of "a correction system that does not correct."

[83] Judge Williams: Excuse me.

Insofar as the freedom of the press point is concerned, are you arguing that the rights of the press are synonymous to the rights of the public or the press has some kind of a special access that the general public does not have?

Ms. Roberts: We are arguing that the press' rights under the First Amendment is the other side of the public right to know. That's not a complete right to

know. That's not a complete right to invade into areas of national security. It is not a right of the press, as representatives of the public to go into the prison in the midst of a riot, in the midst of a demonstration. We are not arguing that.

We are arguing that in order that the First Amendment right to freedom of the press and freedom of expression be protected, that the press has to have access into those prison systems. It is our argument that the——

Judge Williams: A greater access than the average member of the public has?

Ms. Roberts: We argue that the press is here representing the public, but the situation is such that we cannot have assorted members of the public just wandering into the prison. But the public is allowed into the prison in different forms. Relatives of prisoners are involved. Relatives of prisoners go into the facilities. They visit **[84]** with friends. Friends also go. Ministers go into the prison on a regular basis. There are tours, in fact, that go through the prison.

There are different groups that are permitted to go into the prison, talk to prisoners and construct programs. Members of the academic world go into the prison. That is the public.

The press is one additional aspect of the public.

Judge Williams: Are they entitled to go into and talk to a named prisoner?

Ms. Roberts: Pardon me?

Judge Williams: Would a member of the public be able to go in and, say, talk to Charles Manson?

Ms. Roberts: On occasions, members of the public are allowed into the prison facilities. Regulations have been changing all the time.

Initially, only long-term friends and relatives of prisoners were permitted into the prison. Now, it is our understanding, other people are allowed to visit on regular days and regular hours subject to the security and limitations of the prison.

Judge Williams: Are you arguing that the press has less rights than the public or the same rights?

Ms. Roberts: I think perhaps the San Quentin institution Order No. 300 explains some of the public's right [85] to know. This was a document attached to the Answers of the defendant Louis Nelson.

In this institution order, which covers the question of press and information, the prison says:

> "The public is 'in recognition of their right to be informed about the operations, problems, programs and goals of San Quentin and the Department of Corrections'"—pardon me—"and that the public includes both broad audiences reached by the news media"—now I am quoting from the order—"the broad audience reached by the news media and a large group of special public."

The prison concerns itself with these special publics and mentions lawyers, jurists, academics and other people in the community who have an interest.

The order goes on to say:

> "Community understanding of program objectives and their exceptions of program methods are vital to community relations."

It is in fact the institution and the Department's own contention that the public does have a right to know. We feel that the area in which press is excluded makes this right to know meaningless. To have press only being the recipient of prison administration press releases is not an adequate right to know. It does not cover the need of the [86] public to have both a balanced and comprehensive picture of prisons.

Judge Williams: I thought that other regulations allowed the press to come in and interview prisoners that they met walking around the facility, but the only ban that was under attack here was the prohibition of them to interview a specific named prisoner; that if they wanted to interview someone at an adjustment center, they would draw the name out of a hat and they would talk to a prisoner, but they couldn't specify the one they wanted to talk to; isn't that the regulation?

Ms. Roberts: The regulation that is before us specifically says that the press may not interview with specifically designated prisoners and does indicate that there is some move for individual members of the press. It does not make any specific definitions of who those press people are to be, but that they may go through the institutions and talk to people at random.

It is our contention that that does not deal with the First Amendment right to freedom of the press and expression and instead leaves discretion in the hands of prison administrators.

The prison officials have raised a number of reasons to justify this ban. They are: The needs of secu-

rity, the needs of internal administration, and also the big wheel theory.

[87] My colleague, Mr. Doctoroff, will go into those in greater detail.

In all the papers and arguments that we have had, never have any of these theories—though they are important and though those needs must be protected—never have we seen an explanation of why those needs are not met by secure press visiting.

We are talking about visiting of particular inmates in visiting rooms that are secured by guards, people have to go through metal detectors. We are not talking about the press being allowed into the prison and taking over that institution.

We feel that in order that the public have adequate information, a more balanced situation must be presented. It is not enough for just the prison to be able to explain their side of any story.

The public is repeatedly confronted with the need to know about those prisons. There are tens and tens of bills before the Legislature in this country and in California. There are committees in both the California House and the Senate. Those bills present different kinds of ways of dealing with prisoners, stretching from building more institutions, spending more money, to placing greater numbers of people on furlough. The alternatives are just increasing. Every year we have a new proposal for prisons.

[88] Finally, it is the public that must decide on that. Tens and tens of thousands of dollars are spent on prisons each year and an informed public is the

only way to make those kinds of distinctions and definitions and decisions about how that money is to be spent.

Judge East: Ms. Roberts, does the press intend that it has the right to review under appropriate security regulations a prisoner who does not wish to be interviewed?

Ms. Roberts: No.

Judge East: In other words, do they have the right to confront an unwilling prisoner?

Ms. Roberts: No.

The only prisoners we are talking about here are prisoners who have consented.

Judge East: Under the present TRO, which recognizes the right of the prisoner to speak if he wishes to speak, why doesn't that protect the press?

Ms. Roberts: We feel that legally and constitutionally there is a right of the press and that must be affirmed in the decision.

In the specific cases that have come before the Court, we have plaintiffs who are both members of the media and members of the prison population.

Judge East: Then let's extend that right a little further: Would the press contend that it has the right to **[89]** confront a specific prisoner to ascertain whether or not he wants to be interviewed?

Ms. Roberts: In the present situation, the way we understand the administration of the old regulation that bans specific——

Judge East: Under the TRO that absolute ban is enjoined. So the prisoner has the right to call in a member of the press.

Ms. Roberts: Under the temporary restraining order, the Department of Corrections have proposed interim regulations which do include the right——

Judge East: Well, they're under attack, too.

Let us assume that the prisoner's right is established, that he may be interviewed by a newspaper when he desires it, subject to security regulations that are reasonable, why doesn't that in and of itself protect the press and the public's right to know?

Ms. Roberts: Though the regulation that we would like to see in fact would only authorize press to speak to specific consenting prisoners, we do feel there is a legal right of the press and that should be established.

Judge East: To find out whether or not he wants to talk to the press?

Ms. Roberts: As the old regulation stood, which specifically excluded——

[90] Judge East: You won't accept my premise. My premise is that the prisoner does have the right to be interviewed if he wishes it. That's what the present TRO provides for.

Ms. Roberts: Under the old regulations, what in fact happened, apparently from the descriptions that we have been given, were that pressmen and women, as I understand were permitted to go through the institution and at random talk to people who were around. That meant in practice a person could go up to a prisoner and say, "Hello, I am Mr. Jones, of such-and-such a newspaper, I would like to ask you this:" At that time the prisoner, apparently, from

what we understand had the right to say "No, I don't want to talk to you" or "Sure, this is the situation."

So in that situation under the old rule, the press did have that right to talk to prisoners and to have them turn them down but also had the right to ask him.

Judge Williams: You mean the one under attack?

Ms. Roberts: Yes, the one that is under attack now.

Whereas, it did allow press to go through the institution and have the right to talk to press, it refused them the right to talk to specific prisoners.

In a situation like that, clearly the information gathered is going to be limited. There are prisoners inside who have never had an opportunity to see that press person. **[91]** We don't know where those press people were taken to in the institution.

As a matter of fact, though the prison raises the issue of security problems, it would appear to us that all security problems would be enhanced by that kind of old system. Whereas, under rules that are being proposed now, which would allow specific prisoners to talk to the press, security problems could be taken care of, and that visits would go on in visiting rooms secured by guards.

Judge Williams: Let me ask you one question:

Justice White in Branzburg v. Hayes said this on Page 684:

> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."

Now, are you disagreeing with that contention or are you saying "I agree with that," and here the press is also seeking what the public is entitled to have?

Ms. Roberts: We are not seeking at this time the establishment of the rule that individuals on the streets have the right to see any specific prisoners.

Judge Williams: But that the press does?

Ms. Roberts: The press has the right to see consenting individuals in the fact that they represent the [92] public generally. The public——

Judge Williams: Just a moment.

Doesn't that mean then special access to information not available to the public in general?

Ms. Roberts: Pardon me?

Judge Williams: Isn't what you are contending mean in effect that the press contends they can have special access to information not available to the public generally?

Ms. Roberts: The press is always in a different position than the public generally. It represents the public.

In the cases of, for example, Estridge and Sheppard, where the press' right to gather information was limited, it was not banned totally, just in the same way that the public does not have the right of hundreds, for example, to go into courtrooms if there are not enough seats. But the press is always treated with an additional right in that there are seats, for example, reserved for the press.

The public is consistently allowed into the prisons throughout California. Whether it's lawyers, relatives,

visitors, clergy people. We feel that though the prison does have the right to limit as to time and place and matter those interviews, it does not have the right to put a total ban on all press interviews.

Judge Williams: Let's get back to the courtroom [93] situation you mentioned.

Is the press there by virtue of a special constitutional right in the courtroom or are they given special accommodations just as a matter of practice?

Ms. Roberts: I think both are true. They're both dealt with as having a special right as representatives of the public. Their right does not come from some other place. It comes from the fact that they are there as representatives of the public and that they will gather, analyze, disseminate that news as essentially officers of the public.

Judge Williams: If there is a big trial and the press arrive and there are no press tables and the courtroom is filled with members of the public, would the press have a special constitutional right to have some of the members of the public ordered out and have them ordered in? You say that there is a right for them to do that?

Ms. Roberts: I think it is difficult to deal with the specifics of throwing out people.

The rights of the press are protected by the fact that the press is given in a sense seniority or special preference in terms of going into the courtroom. For example, members of the press are given the right to deal with emergency situations such as fires or riots. They're allowed behind police lines, for example, in a situation like that. Whereas, the public individually

is perhaps not [94] allowed in those particular places. But the press stands there as a representative of the public and represents the public right to know that situation.

In the Branzburg case, Justice White in speaking for the Court, also said that he was not suggesting that newsgathering did not qualify for First Amendment protections. He said without some protection for seeking out the news, the freedom of the press would be eviscerated. He said that that First Amendment right must be protected.

In the Branzburg case we have a situation where it is exactly the public's right to know that it is being protected. It happens to be in the form of the right of the Grand Jury representing the State and the public to investigate criminal conduct.

The plaintiffs in that case, Branzburg, for example, had written a firsthand account of a narcotic criminal syndicate. It was the Grand Jury that was investigating, was trying to obtain information, was trying to enforce the public's right to know.

We feel that the Court there was in fact protecting that right. The Grand Jury has served a very different function over the years and has served to protect public's right to protection against criminals.

The prison certainly has the right to maintain security, internal discipline, internal administration. But [95] that right must be seen in the light of the interests of the State.

We have to have not merely speculative problems. We have to be shown, in order to abridge a First Amendment right, we have to be shown that security would in fact be impaired.

Mr. Doctoroff will go into greater depths about those specific reasons. But we are not in any instant shown where the prison's right would be the right to both rehabilitate, the right to security, would be infringed upon by controlled interviews.

The New York State Special Commission on Attica, which was selected by Governor Nelson Rockefeller, with the assistance of Chief Justice Stanley Fold of the highest court of New York, came to the conclusion after extensive study that if prisons were to serve any useful function and if a serious attempt was to be made to prepare prisoners for the return to society, they must not be cut off from contacts with the society.

Judge Williams: That's talking about the prisoners' rights.

Ms. Roberts: Yes.

And that prisons must no longer be shrouded from public view close to the communities in which they are located.

[96] The Commission recommended, in fact, there be established a regular procedure to assure the access of the press so that the public can know and that the function of prisons could be served.

Judge Williams: Thank you.

Ms. Roberts: Mr. Doctoroff will—

Judge Williams: Let's have Mr. Murphy respond to this point.

Mr. Murphy: Perhaps to expedite this, possibly Mr. Doctoroff can go ahead, and I can respond to both.

Mr. Doctoroff: Your Honor, in a non-prison setting, there would be no question that the pure speech

rights that prisoners wish to obtain through this action would be granted immediately. What the prisoners are trying to do is merely to have confidential private interviews with their consent with members of the media.

In a prison setting, because of the hands off doctrine that was in effect for many years, courts had been reluctant to enunciate prisoners' rights. But in recent years, particularly First Amendment rights have been recognized by the courts. And unless the prison administrators and the State can show a compelling State interest why those First Amendment speech rights should be limited is there any hope that the State can in fact limit those rights.

Prisoners, like other citizens, have beliefs, they [97] have thoughts, they want to express them, they want to express them in a form where they will be heard. In a prison setting, because of the necessities of prison life in which prisoners are in fact cut off from the public, there are limited channels through which they may speak to the public. They may express their beliefs, they may describe the conditions under which they live, they may describe what they think, what they feel should happen with the prisoners, what they feel should happen with their lives.

In a setting of the California prisons, the State has attempted to justify its interests, its compelling interest by claiming that the pure speech rights which the prisoners wish to express to members of the media will create security problems whereby the prison administrators will lose control of the prison and chaos will result.

The plaintiffs concede that there is a compelling State interest as far as the necessity of maintaining control over California's prisons. But what the defendants have failed to prove or even allege is that there is in fact a causal connection between having media interviews between consenting prisoners and media in any problems that may arise.

There has been no different evidence which has been presented in this case that any problems have actually arisen out of the fact that press interviews ever took place.

[98] Prior to August 21st, 1971——

Judge Williams: Prior to that time, there were no problems with counsel, either.

Mr. Doctoroff: That is true.

That case is currently being litigated in Marin County Superior Court. Various allegations have been made by both sides in that case.

Judge Williams: They don't have to wait until after a catastrophe before they adopt regulations to prevent what might reasonably be anticipated.

Mr. Doctoroff: I agree with that position.

If the evidence which the defendants are able to amass can show there is some causal connection between a problem which happened at San Quentin on August 21 and a visit, if that can be shown in clear terms and if it can be shown that there is only one way of preventing that type of situation, that is, banning press visits, then that would be an adequate showing. The plaintiffs' position is that defendants have not proven that position and our position now is that they never could prove that position.

Prior to August 1971 press visits were with media, the particular type of relief that plaintiffs in this action wished to obtain, that type of access was allowed, visits took place.

In Interrogatories presented to Warden Louis Nelson, [99] who is a defendant in this action, when questioned about problems that may have arisen during the period where press was allowed to interview prisoners at the institution, he answered saying that there were no problems, there were very few, and there were no problems that he could recall.

The type of evidence which defendants have attempted to introduce to try to show that there is a causal connection between the security problems of a prison and press interviews are totally speculative in nature.

One of their theories is that by allowing press interviews, the so-called big wheel prisoner would be created, and by having these so-called big wheels at large within the prison population, it would create a disbalance or an unequilibrium condition among various prisoners, because this big wheel was so reknown he would undercut the control of the institution by the prison administrators.

That specific point was on remand from the Circuit Court of the District of Columbia sent back to the District Court in the case of Washington Post v. Kleindienst. There were additional fact-findings made by that court. All fact-findings made by that court came to the conclusion that this theory that a big wheel would be created by allowing press interviews with particular prisoners was just so speculative in

nature. There was so little proof that it could not be found to be a sufficient compelling reason to undercut the **[100]** rights guaranteed by the First Amendment.

Judge Williams: The Court accepted that in the Seale case, didn't they?

Mr. Doctoroff: The Court did accept it in the Seale case.

Since the Seale case virtually every case addressing itself to this particular problem has discounted that type of analysis.

This Court itself in granting first the permanent injunction and then the temporary restraining order found that logic to be inadequate to undermine the speech rights of prisoners.

In addition to the fact that the big wheel theory does not give any definite relationship between the press interview and the problems that may arise in the prisons, that type of analysis is just totally deficient in that if the big wheel theory were in fact true, then the same type of argument could be made for either allowing letters to the press, where continual correspondence could create this type of big wheel, or allowing random visits, which the Department allowed under the regulations that are being contested.

In addition, since the issuance of the temporary restraining order and the imposition of the interim regulations which plaintiffs are not totally satisfied with but which do **[101]** allow press visits to occur at California prisons, to our knowledge there have been no problems raised by that situation.

If it can be shown that there are specific problems that arise because of specific interviews, then those interviews should be dealt with singularly. But an absolute ban on all press visits with consenting specific prisoners is not a way of solving specific problems that arise from interviews.

Going back again to the idea that creating a big wheel problems in prison administration will arise, the particular incidents of August 21st, where George Jackson and five other people were killed at San Quentin, the Attorney General has continually raised as the issue in this case.

The fact of the matter is that although George Jackson may have had many press visits during his time in prison, this was all related to the fact that he was the author of a book, best-selling book, which gained notoriety, and most of the visits regarding that book regarded the publication of that book, and it wasn't as though people were just merely coming to the prison to see George Jackson. It was related to a particular thing that he had done which related to media and where there was an interest in both parties then.

I mentioned before that in addition to showing a **[102]** compelling State interest, which plaintiffs at this point argue that defendants have totally failed to meet, even if there are shown a logical connection between press visits and problems that may arise in the institution threatening the security of the institution, the Court must also apply the other side of the First Amendment test, which is that in addition to

showing that there is a compelling State interest that's being protected by limiting speech, the State must show that there is no less restrictive alternative method of dealing with that problem.

We merely have to point out that, as I have already said, problems with particular prisoners or particular press people can be dealt with individually. You don't have to journalize and prevent all visits because of the wrong acts of particular people. You don't have to extend a complete ban on speech rights because someone has abused that right in some way. But even in those instances where abuses are shown, those abuses still have to meet the standard that they create some clear and present danger as to threatening a compelling State interest, i.e., a security need of the institution.

If a particular publication causes problems, the Department of Corrections has claimed in its pleading submitted in this case, it will come back to the institution and cause some sort of disruptions by creating chaos just in **[103]** the language of the publication. That allowing interview which would result in that type of publication should be prevented in order to prevent the publication from coming back to the institution.

The simple fact is that the Department of Corrections already does have the power under Penal Code, California Penal Code Section 2600, to prevent inflammatory literature from coming back into the institution. So that even though they allow an interview which in consequence an inflammatory article comes

out, they still have the power to prevent that from coming back in. They have used that for other types of publications and there is no reason why an absolute press ban which prevents the insistency of such a publication is necessary and why merely not just allowing the publication back into the institution is a sufficient way of dealing with that type of problem.

Plaintiffs also concede that in a time of emergency when there is a clear and present danger as to the security of the institution, then maybe an absolute ban may be necessary. At that time, with a proper showing, we concede that it might be satisfactory to exclude members of the press.

What the ban now does is to prevent prisoners who have things to say, who have lots of ideas about prison and the outside, just something to say because they want to say **[104]** it the way any other citizen has the right to do that, why those people should be barred from doing so when there is no real showing that there is any jeopardy at all to the institution.

Plaintiffs at this point feel, I mean, by showing that the prison administrators have failed both to show that there is a compelling State interest that's being protected by barring press people from talking with willing prisoners and failing to show that there are not less restrictive alternative methods of dealing with any problems that may arise from such press visits, we concede that plaintiffs have made an adequate case before this Court.

In addition to these First Amendment tests that have been traditionally applied, there are numerous

other reasons why prisoners should be allowed to have access to the press. So even if the Court applies a lesser span of a reasonableness test, plaintiffs at this point will show that it's clearly unreasonable not to allow prisoners the opportunity to speak with members of the press.

What the prison administration has attempted to do in defending this action in part is to show that the burden is shifted. They have claimed that since the prisoners have other channels of communication, through letters, through random contact, through tours through the prison where press merely interview random prisoners or draw names out of a hat, **[105]** or where special purpose visits are set up, the defendants claim that this is adequate, these three channels are sufficient to protect the prisoners' freedom of speech.

That type of analysis completely eliminates vital parts of face-to-face visits. A face-to-face visit not only allows for a confidential-type of a relationship where certain types of expression won't be stifled by the censuring arm of the prison administrator, but in addition the illiterate prisoner, the prisoner who is inarticulate, the prisoner who is afraid to come out and say anything in a letter, all of these people will have an opportunity to speak to members of the press and have their views expressed to the public.

The standards which the Department wishes to apply allow that to happen only in a completely random basis and through letters which is an inadequate

form of medium for this particular purpose. Letters may be useful for initiating visits and doing background work, but as far as the ultimate task of interviewing and getting one's words out to the public, it is generally much more effective in doing so through a spoken-type of a communication with the members of the press.

Both the Court in Washington Post v. Kleindienst and Burnham v. Oswald in New York have found that these grounds were sufficient to warrant having face-to-face visits in place of just written communication as far as sufficiently **[106]** being able to protect First Amendment rights.

In addition to the prisoners' right to protect their freedom of speech and most effectively utilize it by having face-to-face contact, the press will have an opportunity to weigh the credibility of statements given by prisoners, in the same way that testimony or deposition has been looked upon by courts as being a better method of evaluating the credibility of various persons' testimony.

In addition to the direct effects of press visits, as far as being able to allow the prisoners to express their beliefs and feelings to the public and to talk generally through the medium of the media person, interviews with media people and interviews generally have been seen by people around the country, as enunciated in various cases on similar matters, which have been heard by Federal Courts and also by the very Department of Corrections which is a defendant in this action.

The Holt report which was written in January of 1972, is a report focusing on family visits and chances of success on parole. Although it does not focus on family-type visitation, it emphasizes all types of visitation as being important to the rehabilitative process. And concluding, the Holt report ends by saying that "All possible means should be taken in order to allow expanded-type visits."

Judge Williams: That's certainly a matter of prison **[107]** administration. This Court is not going to pass upon what's good for rehabilitation or not. I think we are concerned about rights and what the basis for any restraints are. To say it is to the interest of the rehabilitative prisoner to have access to the press I think is beyond consideration, as far as I am concerned.

Mr. Doctoroff: I think it is at issue in that the defendants have raised the position several times that the press interviews may interfere with proper——

Judge Williams: On a selected basis. That comes up in the interim regulation controversy.

Mr. Doctoroff: I think it was raised earlier in the case as well.

In any event, I think the fact that there are positive value besides just the pure speech values of allowing press interviews would completely undercut any balancing test that the defendants wish to have applied as the standard in this case.

We disagree with the fact that is the proper standard. But even that type of standard is being used.

By just balancing the reasonability of the press regulations in terms of rehabilitation and security, we feel that it is outweighed by the positive effect of allowing such interviews.

Judge Williams: Any other points, Mr. Doctoroff?

[108] Mr. Doctoroff: I have a few points.

Judge Williams: Please be brief if we want to get to Mr. Murphy.

Mr. Doctoroff: In addition to just directory benefiting rehabilitation, allowing press interviews and outlawing the particular regulation of the Department of Corrections, which prohibits that type of interview, will be to encourage in the prisoners some respect for the law, which in a context where they have been placed in prison for allegedly disobeying certain of America's laws and where prison administrators apparently with impunity have been able to totally violate one of America's most paramount and important laws, the First Amendment, by striking down this type of regulation and telling defendants they are wrong in their action, plaintiffs believe that this will encourage prisoners to have less than the cynical attitude toward courts in the judicial system which they at this time may have.

Thank you.

Judge Williams: Mr. Murphy, will you also try to separate your response in two portions, one as to the rights of the press to access and, two, the free speech rights of the prisoners.

Mr. Murphy: May it please the Court, the defendants' motion to dismiss, of course, must be premised

on accepting [109] the facts as alleged in the complaint as being true. In doing this, as we must, our position is that there is no legitimate issue presented to this Court to resolve, and that our motion to dismiss must be granted.

I think the starting point, which has not really even been alluded to yet in the arguments raised by plaintiffs' attorneys, is the nature of the regulation at issue itself, namely, the August 23rd, 1971 regulation that was imposed upon the institutions of the Department of Corrections by the director.

That regulation provides—and it is very brief and to the point:

> "Press and other media interviews with specific inmates will not be permitted."

I would like to highlight the word "interviews" and also the word "specific."

Now, if a total ban were to have been imposed by the director in his judgment at that time, he would have written a regulation like this: "Press and other media access to all inmates will not be permitted."

That was not the regulation that was composed and promulgated.

It is our view that this is not a broad regulation, but a narrowly-drawn regulation to meet the circumstances which confronted the director of the California Department of [110] Corrections.

This regulation can be looked at from two sides: First, it does not permit particular State inmates to grant individual interviews to the press or other

media representatives. Secondly, it does not permit the press or other media to conduct individual interviews with particular State inmates.

So what the restriction is to is the face-to-face meeting of a representative of the press or the media with an individual inmate of his choosing or the inmate's selecting a member of the press to interview him.

The regulation does not prevent contact with the media through other means. These means, I think, I will set forth in the previous pleading.

The inmate's access to the media through the mail, the media's access to the inmate through the mail, the inmate's access through his family and friends and even through the courts, if necessary, to file some action in the court to bring his grievance to the attention of the public.

All right. The regulation does not prevent access of the media, to the penal system itself, to the administrators and employees of the Department of Corrections, to the facility of the Department of Corrections, and to the random interview of non-specific inmates, if we can use that term, **[111]** by members of the media.

So our position is that this is a narrowly-drawn regulation which complies with any First Amendment objections and that there was a compelling interest for the promulgation of this regulation.

Judge Williams: Mr. Murphy, if the press can interview occupants of the Readjustment Center on a random basis, what additional argument can you

put forth that would make it unnecessarily burdensome to have an interview with a specific occupant of the Readjustment Center?

Mr. Murphy: Yes, Your Honor.

I think there are several contentions that can be advanced or reasons offered to support this regulation.

First, the effect upon the inmate himself, which is the main concern of the Department of Corrections. I think that's probably, if we were to put priority, that's the first concern. The administrative burden is the second concern.

So the first concern is the effect on the inmate. I see this as a two-pronged effect. First, the effect on the rehabilitation of the inmate. Secondly, the effect on the discipline of the inmate.

I think the record shows here already that this particular regulation was required because it was determined in the expert judgment of the director that making celebrities **[112]** of particular inmates was not in the interest of the inmate himself in the rehabilitative process.

An inmate may arrive at the institution a celebrity already by reason of the nature of the crime that he has committed. Or he may have other circumstances in which the inmate becomes a celebrity within the institution by reason of some other collateral matter, let's say a crime he committed or some poem he composes within the institution.

All right. The position of the Department, I think this is a position because it is a position, a policy decision made by an administrator, namely, that pris-

oners are equal, that you will not and should not give special preferential treatment to any individual inmate, whether he considers himself to be a celebrity or not, or whether the media or any other people might consider him such. This is not part of the function of the rehabilitative aspect of our penalogical system.

Judge Williams: Your regulation bars a lot of people who might not qualify as big wheel.

Mr. Murphy: That is correct. I don't know if I like this term "big wheel." I don't know where it originated.

Judge Williams: It is an inflammatory term.

Mr. Murphy: The point is, I think, a better term is a celebrity. As I argued to Your Honor last week that is a situation where the man or the woman becomes a matter of **[113]** public interest as movie stars would become, or other types of celebrities.

Judge Williams: There are 1500 inmates at San Quentin. You have how many celebrities?

Mr. Murphy: Hopefully there would be no celebrities.

Judge Williams: How many do you have now?

Mr. Murphy: I have no idea.

Judge Williams: Certainly not more than five percent?

Mr. Murphy: I don't know who would or would not be the celebrities. Probably it would be very difficult to identify any celebrities because of the impact which this regulation has had in the 14 months in which it was in operation.

Now, that's the first portion of the two-pronged reasons for the promulgation of the role.

The second reason may be a more serious reason. Not to discount the first reason, but it is more serious because the immediate problem which the institutions are facing, namely, the disciplinary problems of those who gain within the ranks of their peers, within the prison, a celebrity-status by reason of the buildup of themselves and their theories by the press media, namely, where competing rivalries are in existence within the prison system itself and where the attention attracted upon a particular inmate will magnify **[114]** that inmate within the prison system itself so that he can seek and attempt to obtain special privileges, is the other factor, namely, the disciplinary factors.

The other one which I just alluded to, would be the administrative burden placed upon the prison in the event that first the media could demand to talk to any individual in the custody of the wardens and superintendents or the other side, if the inmate could demand to talk to the representatives of his choice of the press.

Judge Williams: Couldn't that be resolved by a reasonable regulation rather than by a prohibition?

Mr. Murphy: Yes, it certainly could be resolved by a reasonable regulation. The question is: Is a reasonable regulation other than this one necessary? Does this not accomplish the purpose which the director had in mind when he issued these regulations?

Judge Williams: You admit, do you not, that these regulations do impose additional freedom of speech of the prisoner?

Mr. Murphy: I am not arguing that there is no First Amendment right of a prison inmate. I would not argue that. I cannot argue that.

I can argue——

Judge Williams: I am not arguing that they're not subject to regulations.

[115] Mr. Murphy: As I understand, what we are here for is to what extent can the Department issue regulations that infringe upon the First Amendment right? How far can the Department go? Has the Department gone too far? I assume that is what the plaintiffs are arguing. I think you could probably argue that the Department could go further than they have with this regulation.

Counsel would concede that in an emergency condition like this—I disagree with what they define as an emergency condition— that you could have the outright then which has not even been suggested here.

Have I answered Your Honor's question?

Judge Williams: We are talking about the balancing of interest of First Amendment rights versus the necessity for maintaining integrity of the institution and discipline and so forth. That there is a balance between the two.

I would say that the administrative burden can be that portion, the balancing on that point I think can be done short of the ban here.

Mr. Murphy: Again, let me indicate and let me highlight that I think the important aspect is a personal aspect in connection with the management of the individual inmate, namely, the rehabilitative and

the discipline aspect as distinguished from the administrative burden.

Now, dividing my comments among the lines suggested **[116]** by Your Honor——

Judge Hamlin: Before you go into that, I am not clear just what you mean by specific in this regulation. What do you mean by that? Do you mean persons who are named by the institution or by persons who are named by the press?

Mr. Murphy: Your Honor, I think Judge Williams gave an example, namely, where a reporter comes into the institution and he demands to see inmate Charles Manson. That is a request to see and interview a specifically-named inmate. Under these regulations, that request would be denied.

To contrast that, if a reporter came in, as they have, and requested to interview inmates who had just been released from death row, the prison would afford that reporter, and did in fact and has in fact on several occasions, furnished or made available to reporters inmates who have been on death row for the purposes of interviews.

Judge Williams: Who might not by the lot method?

Mr. Murphy: That is right. There may be some who would consent to the interview and some who would not consent to the interview. But again that is a way of avoiding the problem of having any individual inmate developed as notoriety within the prison or outside the prison as well.

Our position, of course, is that the Branzburg versus [117] Hayes case disposes of the argument of the media's right to special access to specific inmates. We think that the media does not have a right to special access to individual inmates.

On the other issue, namely, as to the inmate's rights, while the inmate does have First Amendment rights, this regulation is not an infringement upon those rights and is a reasonable regulation.

What I would like to do, Your Honor—and I think this would be most helpful to the Court—I brought an expert witness with me today, namely, the Public Information Officer for the Department of Corrections, and he would be able to give testimony and answer Your Honor's questions with reference as to how the Department has in fact operated, what their experiences have been during the period of time from August 3rd, 1971 through November of 1972 when this regulation which is at issue has been in effect.

This would be for the purposes of our opposition to the motion for the preliminary injunction. We understand that this would not be relevant to our motion to dismiss, which must be confined to the corners of the complaint itself.

It is pleases the Court, the witness is available. I can put him on the stand. I would not anticipate the testimony would take any more than 15 minutes.

Judge Williams: It is the consensus of the Court [118] that as long as the testimony is brief and to the point, why, we will allow it. If it gets out of hand,

we would ask that you file an affidavit and that would be the end of it.

Mr. Murphy: Very good, Your Honor.

Phillip David Guthry,

called as a witness on behalf of the defendants, having been sworn, testified as follows:

The Clerk: State your full name and occupation.

The Witness: Phillip David Guthry. I am the Information Officer for the California Department of Corrections.

Direct Examination by Mr. Murphy:

Q. Mr. Guthry, how long have you been with the Department of Corrections?

A. Since 1963.

Q. Where are your headquarters?

A. Sacramento.

Q. Prior to your employment, did you have similar positions elsewhere?

A. I had a similar position, public information position, with the Department of Mental Hygiene. Prior to that, I was in information work with the State Division of [119] Highways.

Q. Can you describe for the Court your duties as the information officer for the California Department of Corrections?

A. I am staffman to the director of corrections. I handle press contacts, press inquiries that come to the Department, which are numerous, and I have a liaison consulting role with our institutions and with our parole officers with respect to matters relating to

press contacts and general community relations activities.

Q. Within the Department of Corrections, are there others besides yourself who are assigned to duties to work with the members of the media?

A. We consider this the ultimate responsibility of the man in charge in each locality or jurisdiction. But at each institution we have a man who is designated as the press contact. In our parole offices we have people who are the local supervisor and who see as part of their responsibility contacts with the press.

Q. Are you familiar with a Department of Corrections rule, 415.071, which was issued on August 23, 1971?

A. Yes, I am.

Q. May we assume that you were representative for the Department during the period that this regulation was in effect?

[120] A. I was press representative in this period.

Q. Now, between the period of August, 1971 and November, 1972, what were the procedures within the Department of Corrections for media access to administrators and employees of the Department?

A. Well, press has virtually unlimited access to employees and administrators. In fact, we go out of our way to try to make ourselves available and to service the media, recognizing the role they play in keeping the public informed.

Q. Now, what methods or means are used to inform the press through the administrators and the employees in the Department?

A. In this period in particular, we were in an arduous period and we had a great many inquiries. I had days of 80 inquiries.

Beyond that, you have press conferences, and hand out press releases, we print brochures, we take newsmen on tours through institutions and permit them to interview staff and inmates and, in general, make a real serious effort to work with the media so they can get the information they want.

Q. What were the proceedures for access to institutional facilities themselves by members of the media?

A. I can give you an example. Say, a newsman was **[121]** interested in doing a particular story in a prison. He might call the prison director or he might contact me.

If he contacted me, I would deal with the institution, explain what the nature of the story he wanted to do, and arrange for him to enter the institution, talk to inmates, staff, see the facilities and, generally try to help him find whatever information he wanted.

Q. In these interviews with administrators, employees and inspections of institutions, what segments of the media were representative?

A. Well, in that particular period, we probably had more coverage than we had had at any time in prior history. I can think of instances in which reporters for various television stations or radio stations or newspapers spend a great deal of time looking at the institutions under the rules that existed.

I can give you three brief examples. For the San Francisco Chronicle we had a request to interview

life inmates on their opinion of capital punishment. They did not request this on a by-name specific individual basis, but asked us merely to put together a group of lifers.

I asked our institutions to select representative men at three different institutions. The reporters for the Chronicle went to those institutions and interviewed the inmates and did a story.

[122] Another example, at the time death row was being phased out of San Quentin, a Channel 3 reporter by the name of Mike Boyd arranged with us to film the activities on the row and to talk to inmates that he ran across in the course of this film all with their consent. In this context, he did in fact have a film interview with Charles Manson.

Judge Williams: What was the date of that death row phaseout interview?

The Witness: I really don't know the date. It was prior to the new rules, because I had some protest afterwards that we had permitted interviews contrary to our rules and I had to explain it was done contrary.

Mr. Murphy: Q. During this period of August '71 to November '72, what has been the access of the media to the inmate population itself?

A. Well, when newsmen would say they want to cover a particular activity like an Alcoholic Anonymous group or a ethnic study group, they're permitted to go into that activity and to sit in while it is going on and to talk to the inmate participants, also talk to staff or, if they're only in some kind of a general tour, to see conditions and they run across inmates in any

area of that prison from the Adjustment Center to Minimum Security inmates in the firehouse, they may talk to them about any subject that they want to. If they so desire, prison personnel will move away so they [123] can talk confidentially.

Q. Do you exercise any censorship or control over what is ultimately written or published as a result of these interviews?

A. None whatsoever.

Q. Now, what procedures, Mr. Guthry, are there for freelance reporters or scholars working on special projects to have access to the institutions?

A. We treat independent authors, freelance authors and students differently than we do working newsmen who are full-time reporters for newspapers, television, news programs and so on.

Essentially, it comes down to an individual evaluation. We would ask the students to describe to us the nature of the projects, the nature of the questionnaire, then evaluate the time that would be involved, assess what benefit there might be to the inmate, and make a decision on an individual basis.

We would function much the same way with an independent author seeking to write a book. And that would be to check with the inmates, see if they're willing, ascertain that the man was actually a writer.

We have had requests from people who always wanted to write a book and thought prison would be a good subject.

Judge Williams: Excuse me.

[124] You would check with the inmates insofar as the freelance writer was concerned?

The Witness: To see, sir, if the inmate were willing.

Judge Williams: You mean a freelance writer could request an interview with a specific inmate?

The Witness: If a freelance writer asked me if he could interview a certain inmate, I would not permit him if it was a specific individual. If he wanted to go into the institution and talk to a group——

Judge Williams: I thought you said you would check with the inmates?

The Witness: Yes, sir.

In every instance we check with the inmate to see if they're willing to be interviewed with newsmen, independent authors——

Judge Williams: If a freelance writer said, "I want to write a story on John Doe," who happens to be in there doing five to fifteen, he is a freelance writer, not a member of the news media, would he be permitted to have an interview with the specific-named prisoner?

The Witness: No, sir.

However, if a freelance writer were trying to arrange to cover something in a prison that involved interviews with non-specific individuals, we would in any case have to **[125]** obtain the inmate's consent and make an evaluation of the project. But we would consider that a different matter than we would a reporter for the Chronicle or the Examiner or the local television station.

Judge Williams: He still couldn't request a specific inmate?

The Witness: Right.

Mr. Murphy: Q. Mr. Guthry, are there any procedures which provide the public generally with access to prison administrators and inmates?

A. We have hundreds of private citizens entering institutions every week for a whole wide range of activities, inmate activities, including Alcoholics Anonymous and so on.

The California Medical Facility, for example, last year there were 6,000 individual citizens who came in just on a tour basis, not counting those who came in for specific activities like therapeutic groups, Alcoholics Anonymous or bridge clubs.

At San Quentin the number who go in either as tours or participants in inmate activities goes about 10,000 a year. So there is really a rather extensive access.

Q. Now, in your opinion, Mr. Guthry, did the promulgation of the regulation in August 1971, namely, Regulation 415.071, in any way hinder public knowledge through the media of prison problems, disorders or grievances?

[126] A. No.

In terms of the nature of prison operations, the conditions in prisons, the issues that the public must consider, none of the knowledge of any of these issues was not, in my opinion, affected.

Q. What then was the function of this regulation during this period of August '71 through November '72?

A. It is my understanding that the authorities who operate prisons were concerned about two issues: The

first was the effects of the notoriety developed from series of interviews—the effect that would have on the inmates. Second was the effect that that notoriety might have on the operation of the institution. Third was the administrative problem, that is, the time and the effort and the problem that is involved in escorting newsmen to see inmates.

Judge Williams: Were some specific requests to interview specific inmates denied during that period of time?

The Witness: Yes, sir.

We tried to hold to the order. We had few protests from the news media, because we did hold to the regulation justly and we did not permit any newsmen to request an interview on a specific by-name basis.

Judge Williams: How can you say then that the public had all the information that was available where an inmate was prohibited from talking to a specific newsman? **[127]** At least to that extent the information was not available, isn't that correct?

The Witness: To the extent that a specific individual was not able to be interviewed by newsmen, yes, sir.

Mr. Murphy: Q. Are instructions given to information officers at the institutions to alert the press of problems?

A. Yes.

When we have trouble particularly, we have procedures which require our institutions to notify the media and to outline the situation.

Mr. Murphy: I have nothing further.

Judge Williams: Please, Mr. Murphy. You have talked about press access to the facility. You haven't interrogated this witness—maybe he has no information—about how many requests by prisoners were presented and how many of those were denied and what problems would he foresee other than the so-called celebrity problem and whether of his own knowledge as a public information officer rather than a correctional officer he could evaluate the effect on the institutional operations.

Mr. Murphy: Q. Mr. Guthry, do you know approximately how many requests were made by inmates during this period of time for interviews with specific representatives of the **[128]** press?

A. You know, that's interesting. I had never really dealt with an instance in which an inmate has asked to be interviewed.

The way this might develop would be through correspondence. The inmate would write a newsman and suggest, "I would like you to come in and interview me," or pass word through a relative. But I have never had to deal with a request coming from an inmate that I somehow set up for him to have a newsman come in and talk.

Judge Williams: Then it wouldn't be any burden, as far as you know, would it?

The Witness: The burden comes from the other end, I feel.

Mr. Murphy: Q. Do you have any other reasons or personal opinions to support the promulgation of this regulation during the period of time it was in effect?

A. Well, it is my feeling that there are particular notorious inmates who would require that the press would interview them. To cite an example, which I think is of some importance, we have one inmate who was interviewed 66 times in a six-month period, prior to the imposition of the rule banning interviews with specific individuals.

We have some others who would, if they would consent, would be interviewed a great many times, many people who are **[129]** sent to prison for notorious crimes.

Each of those imposes quite a burden on us administratively and it is a matter of concern.

As far as the order of the institution is concerned, there is a real problem that I am told about by prison officials which has to deal with the contending groups in the institution who in effect war upon each other and strive for status and, in order to obtain status, is to get coverage in the news media.

So we see this as a device that might set one group against another, which is a very serious problem and can lead to violence, particularly between inmates.

Mr. Murphy: I have nothing further.

Judge Williams: Give me a specific instance.

The Witness: You mean of gang trouble?

Judge Williams: That was fomented or encouraged or increased by interviews.

The Witness: We feel—I think the prison authority feels quite sincerely that the August 21 incident was in part contributed to by the extensive coverage that was given to George Jackson prior to that.

Judge Williams: You mean the escape attempt?

The Witness: Yes, sir. And the killing of the officer and Mr. Jackson himself.

Judge Williams: Have there been any other escape [130] attempts from San Quentin?

The Witness: Yes, sir.

Judge Williams: Other killings?

The Witness: Yes, sir.

Judge Williams: Do you think that the press had any effect on those to stipulate them?

The Witness: I really can't say they did.

Judge Williams: You think this isolated situation was in effect?

The Witness: Yes, sir.

Ms. Roberts: We weren't aware that this witness was going to be called. We would appreciate five minutes to prepare.

Judge Williams: We will declare a ten-minute recess.

(Recess.)

Judge Williams: Are you ready to proceed?

Ms. Roberts: Yes.

Cross-Examination By Ms. Roberts:

Q. Mr. Guthry, can you repeat your official title?

A. Information officer for the Department of Corrections. My official title is Chief of Information and Community Relations.

Q. That's essentially a job that concerns public [131] relations and press relations?

A. Yes, ma'am.

Q. Is the job generally to present the Department of Corrections' point of view to the public?

A. My job is primarily servicing the media.

Q. Is that to present the Department by and large in the best possible light?

A. No.

I would think it is more of making it possible to have newsmen gather information.

Q. Where were you trained for this job?

A. Mainly by experience in prior jobs and going back to journalism training at college and work as a newspaper reporter.

Q. Approximately how many releases were issued during this period of time when the press releases were issued?

A. It depends on what you mean by a press release. If you mean by written hand-out, the Department of Corrections issues very few. If you mean official response to inquiries, thousands.

Q. So you personally and individuals in that field have talked to thousands of press personnel?

A. I have over a period. Thousands maybe. Hundreds might be better.

Q. By and large, when you're talking to press, either **[132]** face-to-face or, say, by the telephone, you are by and large presenting the Department of Corrections' points of view?

A. Yes. That and relating the facts as they exist.

Q. By and large, the information that you get is from administrators and prison officials, such as the warden?

A. By and large.

Q. So in an emergency, for example, you would call up perhaps the warden and try to find out from him what's happened?

A. Right.

Q. In that kind of situation, do you have any access or any wide access to prisoners?

A. I don't usually seek access to prisoners in those kinds of situations. I could arrange it if I had to.

Q. Are you often inside the prisons or are you often in your office in Sacramento?

A. I would say perhaps once a month I am in a prison.

Q. When you are out at the prison, do you generally talk to the administrators or to prisoners out there?

A. Both.

Q. By and large, you would probably be talking——

A. My business contacts would be primarily with administrators. It is hard to walk through a prison without talking to some inmates.

Q. By and large, you would be talking to the warden?

[133] A. The warden and the public information officer.

Q. Do you think you represent prisoners' viewpoints in your statements to the press, whether it is written statements or telephone conversations or face-to-face?

A. Probably not. Although I try to articulate those if I can.

Q. You said you went to journalism school; you did some studying around journalism in preparation for your job. Did that include trying to analyze and study what balance reporting might be and how best to put that forth to the public?

A. I think so, yes.

Q. What would be your experience in that? How would you define, for example, balance reporting?

A. I would consider a reporter who wrote a balance story is one that represented as fairly as he could differing viewpoints.

Q. Why is it less likely that a prisoner would become a celebrity from an interview that's randomly selected as opposed to specifically selected? You said, for example, that in those death row interviews that were permitted, Charles Manson was spoken to.

Would he be less likely to become a celebrity because he is randomly selected?

A. I think the problem is volume. If we had permitted— **[134]** in the period they were permitting newsmen to request interviews with specific individuals and get them, they would be focusing on one or two or three people, who would then be seen by a large number of newsmen and have what amounted to extensive coverage: As in the case of the 66 interviews that I mentioned.

Q. But in the case of an individual interview, perhaps one or two or a small number of interviews, do you think it is more likely that a prisoner would become a celebrity in a randomly selected interview than a specifically selected interview?

A. I don't think it is likely that one interview is likely to turn an inmate into an overnight celebrity.

Q. How about two interviews?

A. I can't really give you a number.

Q. But you would see that a regulation that limited the number of interviews would have a different effect than say a regulation that permitted any number of interviews in terms of creating a celebrity?

A. If there were limitations, yes, there would be a control over that problem.

Judge Williams: Just a moment.

Who gave the 66 interviews?

A. George Jackson.

Ms. Roberts: Q. You consider George Jackson a **[135]** celebrity?

A. At the time of his death, I considered him a celebrity.

Q. Do you know when the press interviews began of George Jackson?

A. At the time he was charged with murder.

Q. Do you know whether he was considered a celebrity within the prison walls before that time?

A. To my knowledge, he was not.

Q. Do you know whether or not there are any other causes for him to become a celebrity, for example, the publication of a book?

A. I considered—I felt—and this is my opinion—that there was a deliberate effort to cause him to become a celebrity in this period.

Q. He did publish a book during this period?

A. Right.

Some of this may have been promotion for the book.

Q. Do you know whether or not he published articles in journals or magazines during this period?

A. I am not familiar with other writings.

Q. Do you know whether or not he was——

Isn't it a fact that he was on trial facing the death penalty?

A. Yes.

[136] Q. You stated before that the incident and the explosion on August 21st was related to the fact of press access.

Can you explain that?

A. It is my feeling that the notoriety that developed in this instance surrounding Mr. Jackson and others that he was affiliated with in that lockup unit through press conferences that were conducted by lawyers through long and extensive coverage in the so-called straight media and the underground press through the publication, the arranging of a publication of a book, that all these created a false sense of status both in the man and false perception and caused them to be problems in terms of the control of the institution.

Q. How did that contribute to August 21st?

A. I think that this was just one factor that led up to what was a terrible tragedy explosion on that date. Had this notoriety not been attained by those people that that would probably have been less likely to have occurred.

Q. Isn't it true that in fact that notoriety resulted in that the incident was very widely covered after

August 21st, but not so much in fact caused the actual incident?

A. I am not saying that it caused it directly, but I say it was one of many factors that contributed to the dynamics that resulted in that tragedy.

[137] Q. You can't be more specific about that?

A. I don't think we are talking about something that you can be that specific on.

Q. You are talking about the First Amendment right of prisoners and the press. So I'm trying to find the causal relationship between an incident like that.

Do you know how many other such violent incidents or, perhaps not as violent, but how many other incidents where prisoners were killed and where correctional officials have been killed? Or seriously injured—that has happened within say, the last two years?

A. You mean where there was a press involvement?

Q. I am asking now whether you know how many other instances there have been where prisoners have been killed or where correctional officers have been killed?

A. I can give you a couple of examples.

In the period of 1970 through today, we had ten correctional employees murdered. Last year, due partly to gang warfare between the two Chicano factions, there were 34 inmate murders in the correctional system of California.

Q. Do you think that either the presence of the press or the absence of the press in any way led to those deaths, both of the guards and of the prisoners?

A. I feel in an indirect way.

Q. Can you be perhaps a little more specific about the [138] indirect way?

A. It is my feeling that coverage of those activities may plant the seed. I know people who are prison administrators have often said this to me.

Q. That's as specific as you can get about the relationship?

A. Yes.

Q. That's all based on not your firsthand experience in terms of the prison situation, but rather on prison officials' thinking that that might be?

A. Right.

Q. How do you select the media that is permitted to go in?

A. Over the years I've——

Q. Let's limit it to perhaps——

Judge Williams: The media, generally.

Ms. Roberts: Now, I am talking about the media, generally, press, newspapermen, women.

Judge Williams: We are not getting into the interim regulations, are we?

Ms. Roberts: Q. I am talking about the period of time after August 21st until the interim regulations have been put into effect.

A. There isn't any hard and fast rule. I never have had any real problem with it.

[139] I considered working newsmen, that is, reporters for television news programs, radio news programs, daily newspapers and newsmen and treated them consistent with policy.

Q. So there weren't any guidelines that you followed?

A. No. Just general practice. We were guided by my experience in mental hygiene and my experience with the Highway Patrol.

Q. Were there any guidelines that you gave to your, I guess, subordinates in this matter, say, officials at different institutions?

A. Yes. I would say if it is a newsman you know to be an employee of a newspaper or a television station, you work with him, if you got some doubts about it, well, consult about it and see if we can establish for sure that's who he is.

Q. In terms of prisoners requesting to see newspeople or groups of prisoners, you mentioned, for example, Alcoholics Anonymous, how was it—how was the decision made in terms of that?

A. I have never really dealt with a request from an inmate group to see newsmen except in time of emergency when we bar media access.

Q. So your field of expertise is not really related to the question of prisoners requesting to see media and press personnel?

[140] A. If a group of inmates were asking to see the press, it would be likely that the institution would inform me.

Q. When a press person or media person goes into a prison, they're allowed to talk to specific prisoners, isn't that right?

A. No.

They're not permitted to request an interview with a specific individual. However, if they are wandering

through one of the housing units and there are inmates in there, they can talk to them about any subject they want to.

Q. Once they're in there, they do talk to specific prisoners?

A. Not on a specific request basis. They talk to people who are prisoners, that's right.

Q. They do go up to a person and say I would like to talk to you, I am so-and-so and they do talk to prisoners?

A. Right.

Q. If they came upon individuals that they knew about, heard about and told about, they could talk to them?

A. They could.

Q. They could talk to those people?

A. Right.

Q. If a prisoner, for example, when a newsperson was on tour, went up to a newsperson and said, "Hey, I want to talk **[141]** to you," that would be permitted?

A. That is right. If a newspaperman wanted to do it.

Q. Are there certain areas in which tours are generally taken and certain prisoners who are not permitted to be around those tours?

A. We are very careful about tours through some of the lockup units. However, newsmen are permitted to enter there and to talk to people. But we try to control the conditions under which those occurred more closely than we would the main line population.

Because that's obviously a more secure area, more risk involved.

Q. Do you think a visit in a visiting room facility which would be under the regular supervision of guards and correctional officials would raise a greater security problem than an individual group of newspeople wandering through on a tour?

A. No.

Q. How do you accept general suggestions for stories?

A. What?

Q. How do you accept suggestions that are made by newspersons for stories? Are some stories acceptable and some not?

A. Very few are unacceptable. Many newsmen call and say, I want to do a story on a certain subject. We try to work with him so he can do that story.

[142] Q. Have many of the stories that have come forth been critical?

A. I would say quite a few.

Q. Have there been stories about brutality?

A. There have been newsmen that have quoted inmates to that effect.

Q. There was recently, as I understand, a strike at San Quentin Prison?

A. Right.

Q. Approximately how many requests for information did you have?

A. In the week of the strike, San Quentin had something over 20 inquiries. They kept a record. I don't have the document with me. Something over 20.

Q. Do you know how those inquiries were dealt with by the local prison officials?

A. The newsmen would ask what's going on, and they would tell them.

Q. So there would be face-to-face interviews by newsmen and prison officials?

A. Or by telephone.

Q. And perhaps a press release?

A. And some appearance on television.

Q. Do you know if prisoners were talked to?

A. No prisoners were permitted to talk during the course [143] of the strike nor was the press permitted to enter the institution.

Q. Do you know whether prisoners have since been permitted to talk to press people about, for example, the issues of that strike?

A. Newsmen have been permitted to go into the institution since then. I don't know that they have talked to the inmates specifically about the strike.

Q. You said that many public citizens were permitted into various institutions under security control. You suggested that something over 6,000 different individuals had been in Vacaville over that period of time.

A. That's in a year.

Q. And something like 10,000 at San Quentin?

A. That is right.

Q. Do you have any idea how many prisoners would have newspeople who would be willing to go see them if permission were granted?

A. Relatively, I would say a small percentage of the total population of 19,500.

Q. So it would be relatively small?

A. Yes.

I don't really see too many newsmen without some idea that there is a news story involved, just responding to an inmate's request to come interview him.

[144] Q. You wouldn't see a flood at the gates of San Quentin?

A. Only in the case of certain very notorious individuals.

Q. You think that certain prisoners would command more news interest but that generally there would not be a flood?

A. Right.

Q. You said also that the bridge club was permitted and people from the outside were permitted to go——

A. People from the outside would play bridge on one night of a week with a group of inmates who were participating in a bridge club.

Q. That means specific prisoners could sign up and go each week or month and meet with people from the outside?

A. Yes, that's right. It is not a situation where the bridge players are coming in to see a specific individual.

Q. But there are specific individuals that go each month?

A. Sure.

Q. Do you know whether or not the public is permitted to see specific prisoners?

A. Members of the family who were permitted to visit with a relative.

Q. Lawyers?

A. Lawyers.

[145] Q. Clergy people?

A. Clergy people.

Q. Any other groups of people that are generally involved?

A. No.

But, of course, on a special purpose basis, we could permit it for virtually any private citizen. That would involve knowing what the purpose of the visit was.

Q. Can you classify persons who are high risks in terms of prison as to the problems with extensive interviewing?

A. I would say those where there is an exceptional amount of news media interest.

Q. So the more news interest the higher the risk?

A. Yes.

Q. It is not related to the prisoner as a prisoner initially and then the news interest is created?

A. Somebody who committed a very highly-covered crime would be a notorious inmate from the moment he arrived and would be the subject of interview requests from the media.

Judge Williams: Would that make him a risk insofar as the administration is concerned?

The Witness: Only in the idea that it would give him a status problem within the institution and would also plunge him into a notoriety role with respect to other inmates.

[146] Judge Williams: How about Dr. Bernard Finch; was he a problem?

The Witness: No, he was not. He was not a problem.

He was a high-news interest case when he first came in, but over the years we had very few contacts about him until the time he was to be released.

Judge Williams: But not a problem as far as the administration and facility was concerned?

The Witness: No, sir.

Judge Williams: How about Carol Chessman?

The Witness: That was before my time. From what I have been told, he was a problem.

Ms. Roberts: Q. How do you deal with individuals that are so-called celebrities prior to the time that they're incarcerated, either because of some outrageous crime or because of some other reason?

A. Well, under this regulation they could not be interviewed on a specific by-name basis.

Q. Are they permitted to see attorneys?

A. Yes.

Q. They're permitted to write articles, for example?

A. They could perhaps send articles out or they could write to a newsman.

Q. Doesn't that contribute to their role as big wheel or celebrity, do you think?

[147] A. Probably to some extent.

Q. But the Department does not stop that kind of publication, for example, from both going out and then coming back in?

A. We have no ban on it.

Q. It does not stop them?

A. Right.

Ms. Roberts: I don't have any further questions.

Mr. Murphy: Just one question.

Redirect Examination By Mr. Murphy:

Q. Mr. Guthry, the strike that you referred to at San Quentin, do you know approximately when this occurred?

A. In the last couple of months.

Q. Was it subsequent to November of '72?

A. I believe it was when the new interim regulation went into effect.

Mr. Murphy: I have nothing further.

Judge Williams: I have one question.

In view of your experience, if a random opportunity to interview prisoners is available, what additional problem other than the so-called celebrity problem, presents itself if there is a selective right to interview? The only difference would be the celebrity problem, is that right?

The Witness: We see that as a major reason for [148] adopting the no specific inmate rule.

Judge Williams: You said that inside the institution at least George Jackson was not a celebrity prior to the time of his incarceration?

The Witness: To my knowledge he was not.

Judge Williams: That is all. Thank you.

Anything else to be presented at this time?

Mr. Murphy: No, Your Honor.

Mr. Doctoroff: I would like to clarify several matters that were discussed in Mr. Murphy's earlier argument.

Judge Williams: All right. A very short response?

Mr. Doctoroff: Yes, it would be.

Your Honor, the entire Court was questioning the greater right that the press has over that of the general public. I think a simple answer to that is found in the language of the First Amendment itself which specifies that the press has a higher right than that of the general public.

There is a freedom of the press. It is not a freedom of the general public to go out and gather news, but it is a freedom of the public to publish and gather news as a necessity component to that type of publication.

Judge Williams: A higher right, you say?

Mr. Doctoroff: A higher right by the very fact that they are in the business of publishing. If a private citizen is in the business of publishing something that is **[149]** generally considered to be media, then that public citizen has transversed from his role as just a private citizen to a person who is in a role as a press person.

Judge Williams: The language of the First Amendment speaks of freedom of the press, freedom of speech, freedom of assembly.

Mr. Doctoroff: I agree.

Judge Williams: You say that the press has a special right?

Mr. Doctoroff: The press has mentioned in the First Amendment itself.

Cases going back to the Zinger-type cases afforded particular rights to people who were publishing.

Judge Williams: It says: "Congress shall make no law abridging the freedom of the speech and of the press." That's applicable to the State by the Fourteenth Amendment.

Mr. Doctoroff: Yes.

Judge Williams: You're saying that gives the press a greater right of access to the media than the public has?

Mr. Doctoroff: I think virtually every State agency in existence has acknowledged that the press does have a special interest in obtaining news above that of the general public.

Judge Williams: Not interest. How about right?

Mr. Doctoroff: I think it recognizes the rights [150] that were enunciated in the First Amendment by providing particular type of treatment. It just acknowledges the existent right.

The fact that San Quentin Prison and other prisons of the Department of Corrections encourages press people to go through their institution on tours and talk to individuals and write stories, I think acknowledges the fact that they at least recognize that the press does have a special role that it plays in American democracy.

They are attempting in a very limited way to encourage that type of activity but, as plaintiffs are contending, that limited random-type visit or special purpose-type visit is inadequate in order to fully protect that right of the press that's being protected by the First Amendment.

In addition, I would like to point out——

Judge Williams: Have you any cases on that point?

Mr. Doctoroff: I don't have them before me now.

Judge Williams: I have looked and looked. The most specific language I have found is the language of Justice White in Branzburg in which he says it has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.

Now, I agree that generally they should have information and they're invited into places, but to lock that into **[151]** a special right over and above the right of the public to know, is a step that I don't think any court has yet taken.

Mr. Doctoroff: I think there is other language in Branzburg that does acknowledge that the press has the right to gather news.

Judge Williams: Also they can't have their freedom of speech themselves inpinged upon. I take that to mean that they have a greater right in view of that language than the public generally.

Mr. Doctoroff: I mean, in order that the freedom exercised by prisoners be effectively be able to be expressed to the general public the right of the press to obtain those stories and to sit in on those interviews has to be acknowledged in and of itself since these self-same standards that apply insofar as infringing prisoners' rights should also apply to the rights of the press.

The same compelling State interests that are being raised by the State in trying to strike down the prisoners' freedom of speech are the same standards that have to be applied when the freedom of the press is being limited.

I agree that the press does not have any kind of a right over the general public in most areas. As my co-counsel pointed out, trials are held and the press is given special treatment, because the Courts have come to recognize that the press, in gathering news to disseminate to the general public **[152]** is doing a special service.

Judge Williams: The case that's gone furthest in that direction, if that's the right word, is Washington Post versus Kleindienst.

In his opinion, the judge there stated on Page 3:

> "There are few decisions that have considered whether the First Amendment implicitly guarantees access to news sources under special conditions such as those presented here."

That's a prison case.

> "While the right to publish is firmly established, amendment implications in terms of access are not resolved."

I have looked for other cases as well.

Mr. Doctoroff: I agree with that.

I would go further to say that Branzburg is a very specific instance regarding Grand Jury processes. The Court can find that, by the nature of the fact that other people do go into California prisons, they have access to the prisons, it is not as though there is a complete bar to the public to the prisons, and people have access for the purpose of specific visits with specific prisoners.

An individual can ask to become listed on an individual prisoner's list, visiting list, and go visit him any time he wants. This is an individual member of the public who is able to visit a specific prisoner.

[153] By nature of the press' rights as defined in the First Amendment, I think that they can rise above the mere limitations to visit one prisoner so that they can visit other prisoners.

Judge Williams: I think we have all conceded that the prisoners have First Amendment rights and are subject to reasonable regulations of the rights versus the needs of the State.

Now, if you are contending that the press has a special constitutional right of access, are you also conceding that that right of access can be modified or controlled by administrative regulations that the State can justify?

Mr. Doctoroff: Yes.

Judge Williams: Would you say that the right of access, if there is one, can be modified and qualified by some government agencies?

Mr. Doctoroff: By the standard First Amendment cases which apply to both prison and non-prison situations—recognizing the differences between the objective conditions inside prisons and outside prisons.

The same standard should apply with the recognition that things are different.

Judge Williams: I think that's a whole new field that the Courts have not tred into yet—as far as being able to evaluate when the rights of the press can be modified.

[154] Mr. Doctoroff: I just would like to make one further analogy.

The fact that a person who's speaking to a large audience has the right to speak out does not necessarily deprive any member of that audience the right to come up and speak to him.

This situation is somewhat different, because there are walls and limitations created by the prison situation. But the same freedom of speech, freedom of press interviews, media interviews, who have something to carry out and whose general activity is protected by the First Amendment freedom of press, should raise their interest above that of just a member of the public.

I realize that there is very little authority on this precise area, but I think that the Court could find, I mean just on the basis of the First Amendment and the existent cases, recognizing the right to gathering news, that where there is no compelling State interest whereby the press should not be allowed in, then they should be allowed in.

I realize that the Court has in the earlier temporary restraining order acknowledged that the press has the right to go in as a necessary concomitant of the prisoners' free speech rights, but I think that the media rights should be affirmed also in order to make the opinion completely sound.

[155] So that on the one hand press interviews are allowed not necessarily just because of the prisoners' free speech rights, but also recognizing that they have a right. It is not just a member of the general public that the prisoners are speaking to either, when you gauge the prisoners have the right to freedom of speech. It is not to any member of the general public, it is through this media and I think you have to recognize that that media right is also necessary.

Judge Williams: Okay.

Anything else?

We will take the matter under submission and we will anticipate your points and authorities within ten days.

We will stand adjourned.

[Certificate of Reporter Omitted in Printing] [p. 156]

ATTORNEY GENERAL-OFFICE COPY

United States District Court
Northern District of California
[Filed February 23, 1973]

[Caption Omitted in Printing]

RESPONSE OF DEFENDANTS TO MEMORANDUM OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Upon permission of the Court, granted February 14, 1973, defendants respond to the amici curiae memorandum filed by the American Civil Liberties Union Foundation.

Argument

Section 415.071 does not violate any rights of the public or of the press

Section 415.071 precludes press and other media face-to-face *interviews* with *specific inmates;* it does not deny press and other media *access* to inmates generally or to specific inmates by means other than interviews. In no way is the press prevented from using its normal sources to gather prison news or is the press prevented from publishing what it wishes concerning prisoners and their conditions.

In *Branzburg v. Hayes,* 408 U.S. 665, 682-683 (1972), the court said:

> "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial interest may be enforced against the press as against others, despite the possible burden that may be imposed."

The Department of Corrections' rule, indeed, does not restrict the right of the press to publish and circulate prison news. *Compare, New York Times Co. v. United States,* 403 U.S. 713 (1971) [injunction against publication of classified material]; *Time, Inc. v. Hill,* 385 U.S. 374 (1967) [damage award on publication of crime story]; *Near v. Minnesota,* 283 U.S. 697 (1931) [statute against publication of defamatory matters]. It is not a form of registration or licensing. *Compare, Organization for Better Austin,* 402 U.S. 415 (1970); *Lamont v. Postmaster General,* 381 U.S. 301 (1965). The First Amendment does not protect press in their mercenary activities and the notion that the press has some higher First Amendment rights than has the public generally has been repeatedly denied. *Red Lion Broadcasting Co. v. Federal Communication Commission,* 395 U.S. 367 (1969); *Associated Press v. United States,* 326 U.S. 1 (1944); *Dieteman v. Time, Inc.,* 449 F.2d 245 (9th Cir. 1971).

This certainly is not a case where the press is being denied access to places open to the public for news gathering; rather, at most, this case involves a limited

and narrow stricture on access to prisons which are closed generally to the public. The press does not have any special claim to access to California's prisons and their inmates. *See Zemel v. Rusk,* 381 U.S. 1, 16-17 (1965); *Tribune Review Publishing Co. v. Thomas,* 254 F.2d 883, 885 (3rd Cir. 1958); *United Press v. Valente,* 308 N.Y. 71, 123 N.E.2d 777, 778 (1954).

The promulgation of the instant rule was not done arbitrarily or capriciously; it was not announced at the whim of the Director of the Department of Corrections. The rule is based upon considerations which are real and supported by experience, and is promulgated in good faith. Attached, marked EXHIBIT A, is a copy of the sworn testimony of defendant Procunier given in *Washington Post v. Kleindienst,* Civil Action No. 467-72 (D.D.C.).

The Department, as evidenced by the testimony of Philip Guthrie, provides a comprehensive system under which the press is afforded the opportunity to interview and consult with administrators and employees of the prisons, to inspect prison facilities, to meet with inmates at random so as to learn about and report on conditions or grievances. The press has, of course, access to specific inmates through the mail, through their families and friends, through their attorneys and clergymen.[1]

[1]In the Departments' judgment there is a substantial difference in degree of impact between an individual interview with a particular inmate and the usual exchange of letters between the press and the inmate. The individual interview focuses attention on the inmate within the prison and may result in special privileges for the inmate which is not related to his good behavior and impairs rehabilitation and discipline. Moreover, it presents a serious administrative burden and potential security hazard.

Contrary to amici curiae' claim that rule 415.071 is an "absolute prohibition" by which the "government is closing off its own operations to the press," the Department furnishes a comprehensive system of public information which encourages rather than precludes public knowledge. The rule does not broadly ban access of the press to prisons and prisoners.

In the name of "press freedom," which has no unique standing under the First Amendment, this Court should not substitute its judgment for that of prison officials charged by law with the responsibility for prison management; such officials are permitted reasonable flexibility in rule-making in view of the practical problems they face in the prison environment. *Cruz v. Beto,* 405 U.S. 319, 321 (1972).

Dated: February 23, 1973

Evelle J. Younger,
Attorney General of the State of California

Edward A. Hinz, Jr.,
Chief Assistant Attorney General—Criminal Division

Doris H. Maier,
Assistant Attorney General—Writs Section

Edward P. O'Brien
Assistant Attorney General

/s/ John T. Murphy
John T. Murphy
Deputy Attorney General
Attorneys for Defendants

JTM/EW
CR SF 019920

Exhibit A

In the United States District Court
for the District of Columbia

The Washington Post Co. and Ben H. Bagdikian, Plaintiffs, vs. Richard G. Kleindienst, Acting Attorney General of the United States and Norman A. Carlson, Director United States Bureau of Prisons, Defendants.	Civil Action No. 467-72

Washington, D. C.
March 23, 1972

Ida Z. Watson
Official Reporter
U. S. Court House
Washington, D. C.

Copy for:
Defendants

In the United States District Court
for the District of Columbia

The Washington Post Co. and Ben H. Bagdikian, Plaintiffs, vs. Richard G. Kleindienst, Acting Attorney General of the United States and Norman A. Carlson, Director United States Bureau of Prisons, Defendants.	Civil Action No. 467-72

Washington, D. C.
March 23, 1972

The above-entitled cause came on for hearing on Plaintiffs' Motion for Preliminary Injunction before the Honorable Gerhard A. Gesell, United States District Judge, at 9:40 a.m.

Appearances:

Joseph A. Califano, Jr., Esq.,
Charles Wilson, Esq.,
Richard Cooper, Esq.,
Of: Williams, Connolly & Califano,
Counsel for Plaintiffs

Joseph M. Hannon,
Michael A. Katz,
Assistant United States Attorneys,

Eugene N. Barkin, Esq.,
Julia S. Willson, Esq.,
Department of Justice,
Counsel for Defendants

[2] Contents

Witnesses	*Direct*	*Cross*	*Redirect*	*Recross*
Plaintiffs':				
Ben H. Bagdikian (Plaintiff)				
By Mr. Califano	6			
By Mr. Hannon		26		
By Mr. Califano			56	
By Mr. Hannon				58
Benjamin Malcolm				
By Mr. Wilson	60			
By Mr. Hannon		80		
By Mr. Wilson			88	
Leroy Anderson				
By Mr. Wilson	91			
By Mr. Hannon		102		
By Mr. Wilson			105	
Defendants':				
Raymond K. Procunier				
By Mr. Hannon	109			
By Mr. Califano		126		
Noah L. Alldredge				
By Mr. Katz	137			
By Mr. Califano		156		
John J. Norton				
By Mr. Katz	172			
By Mr. Califano		185		
Norman A. Carlson (Defendant)				
By Mr. Hannon	187			
By Mr. Califano		206		

[2-A] Contents (Cont'd)

Exhibits

Plaintiffs':		*For Identification*	*In Evidence*
No. 1	Amendment to rules and regulations dated January 4, 1972.	63	67
No. 2	Guidelines for identifying members of the news media.	63	67
No. 3	Amendment to rules and regulations.	63	76
No. 4	Memorandum dated March 22, 1972 from Mr. Walsh to Mr. Malcolm.	76	76
No. 5	D. C. Corrections Department Order 1300.3B, dated January 24, 1972.	93	95
No. 6	D. C. Corrections Department Order 1300.3A, dated April 2, 1971.	93	95
No. 7	D. C. Corrections Department document 1300.3, dated November 2, 1966.	93	95
No. 8	D. C. Corrections Department document 1300.1,dated August 10, 1956.	93	95

[109] have a record closed without it. It is a matter of indifference to me as to who calls him.

Mr. Hannon: Not to me. I will call him. Mr. Califano can rest.

The Court: Mr. Califano is giving you that opportunity.

Mr. Hannon: I take it the Plaintiff has rested?

Mr. Califano: Yes.

The Court: Yes.

Mr. Hannon: May I call, on behalf of the Government, Mr. Procunier, please.

Whereupon—

RAYMOND K. PROCUNIER

was called as a witness by the Defendants, and after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hannon:

Q. Mr. Procunier, would you tell us your name, please, and spell your last name for the benefit of our Court Reporter?

A. Raymond K. Procunier, P-R-O-C-U-N-I-E-R.

Q. Mr. Procunier, where are you employed, please?

A. I am Director of Corrections for the State of California.

Q. And how long have you been employed in that capacity, sir?

[110] A. Since May of 1967.

Q. Now, would you tell us, if you please, your history insofar as it relates to penal institutions?

A. I started in corrections in April 1948.

Q. If you will slow down a little bit, our Reporter will be able to keep up with you, please.

The Court: She is pretty good; go right ahead.

The Witness: I started as a correctional officer in the California Department of Corrections at the California Institution for men, a minimum security institution in Southern California, in April 1948, as sergeant lieutenant there and training officer for that facility, and transferred to Sacramento in 1956 as an Assistant Departmental Personnel Officer. From there I went to Utah for a year, during 1957-58 as Deputy Director, Personnel Management and Training; and then for six months, the last part of it, I was Director of Corrections in Utah, after they had some difficulty, and during the reorganization and revamping period; followed by return to California as Departmental Training Officer and Associate Superintendent for four years at the California Medical Facility, our psychiatric hospital in Bakersfield. Following that, I was the Superintendent for Inmate Classification in charge of all classification and transfers in the department; then Associate Superintendent of Custody and Superintendent—Associate **[111]** minimum and maximum security institution for young adult prisoners at Tracy; following that, as Superintendent. That brings it up to '67. From then to now, as the Director of Corrections.

Q. Mr. Procunier, would you describe for His Honor what the California penal institutions consist of, please?

A. We have 12 major institutions that handle all of the Superior Court commitments that are sent to state prison. We have a total prison population of women and men, and our civil narcotics addict program in California, where the men are committed and

women are committed under civil commitments for the control of narcotics addiction, a total of about 20,000, approximately 20,000 people in prison, 21 to 22 thousand people on parole.

Q. Twenty thousand in prison in California?

A. Yes.

Q. Approximately?

A. Yes.

Q. For what type of offenses, Mr. Procunier?

A. For the whole range of felonies.

The Court: From petty larceny to murder?

The Witness: Well, we have very few petty larcenies any more. Felonies.

By Mr. Hannon:

Q. What kind of staff do you have?

A. Seven thousand, approximately 7,000 members on the [112] staff.

Q. Who runs each of these institutions?

A. The warden or superintendent.

Q. And how many would that be?

A. Twelve.

Q. Twelve. And you deal closely with them in the operations of the system in California?

A. Yes, you bet.

Q. Now, at one time, did the State of California allow interviews of prisoners by the news media?

A. Yes, we still do, but we had a policy at one time unless there was some obvious reason why not that the individual interviews by name and number were allowed with the accredited press.

Q. So that the newspaperman could make arrangements through your office to interview, face-to-face interview with prisoners?

A. It wasn't necessarily through my office. He could make arrangements with the warden, superintendent or through my office.

Q. Has that practice been discontinued?

A. Yes.

Q. Do you know or did you know an individual named George Jackson?

A. I didn't know him personally.

[113] Q. But you knew of him?

A. Very well.

Q. Was he confined in penal institutions in California?

A. Yes.

Q. Under your jurisdiction?

A. Yes.

Q. He is deceased, is he not?

A. Yes.

Q. Did Mr. George Jackson have anything to do with the judgment of your office to discontinue news media interviews of prisoners?

A. Yes.

Q. Now, would you tell Judge Gesell, please, the criminal history of George Jackson as you recall it?

A. I can't tell you specifically, but it dates back to his early childhood of being involved with the law. He was doing time at the time of the involvement in the incidents that are now very notorious for armed robbery.

Q. And he had a long criminal history, did he not?

A. Yes.

Q. He had been in and out of penal institutions in California?

A. Yes.

Q. At the time of his death, how old was he, do you remember?

[114] A. I don't remember.

Q. Approximately?

A. Twenty-eight, twenty-nine, I don't know. It is just a guess on my part.

Q. Now, when did——

The Court: Are you telling the Court, because of the Jackson incident, you have permanently discontinued any opportunity for interviewing by the press of 20,000 inmates——

The Witness: No.

The Court: —for the future in your system?

The Witness: No. I responded to the question, did his relationship with the press in individual interviews have anything to do with the change of policy. The answer is, yes.

The Court: The change of policy doesn't prohibit interviews?

The Witness: No individual interviews upon request by the media are any longer allowed.

The Court: Specific interviews are no longer allowed? You have prohibited that throughout the system because of the Jackson situation?

The Witness: No, that was one element in the decision. That was my response to the question.

The Court: I am really anxious to know not so much about Jackson as the reasons why you discontinued the practice.

Mr. Hannon: Does Your Honor know Jackson?

[115] The Court: No, he was not a personal friend of mine. I read the papers like everybody else.

Mr. Hannon: I am anxious that you know about him.

By Mr. Hannon:

Q. So would you tell us, Mr. Procunier, about George Jackson, and what his history was in California?

A. George Jackson was a relatively unknown outside the prison but well known inside the institution up until January 1969, when he was charged with the murder of—he, along with two others charged with the murder of a correctional officer at our California training facility at Soledad. Then from then on until August 21, the incident at San Quentin, in which he was killed, he became more and more notorious and as a result in part of our policy for allowing interviews with individual inmates by the press.

Q. What were the circumstances under which George Jackson was killed at San Quentin?

A. By a method—it is in trial now, so we do not know for sure, but a gun was smuggled into San Quentin to him and he attempted to escape and was killed in the escape attempt.

Q. Did he kill anybody in the effort to escape?

A. Yes.

Q. How many?

A. There were three people, three staff members killed and two inmates killed, and three staff members wounded in the [116] circumstances surrounding the escape.

Q. All right. Now, prior to his death, did the press in California have access to George Jackson?

A. Yes.

Q. And what kind of access did they have?

A. Well, it was our policy at the time for accredited news media to hold individual interviews upon requests, and until we stopped that because of the burden of work and the problems we felt it was creating, he had access for a period of about six months there, almost unlimited access.

Q. During the six-month period, can you recall, Mr. Procunier, how many interviews did he have with the press?

A. From August of 1970 until June of 1971, we have recorded—and there may be many more—33 interviews with various media reporters.

Q. And were these interviews that Jackson had with the press over the six-month period published in the newspapers?

A. Yes, many of them.

Q. Then did the penal institutions in California have free access to newspapers?

A. With the exception of on rare occasions that some publications, issue-by-issue, but the answer, generally, is, yes to all what we call legitimate——

The Court: That is because of your policy. You could have stopped the papers from coming in, couldn't you?

[117] The Witness: No.

The Court: You can't stop the newspapers?

The Witness: No, we have a section in our Penal Code, enacted three years ago, that we cannot stop

anything coming in unless issue-by-issue it was determined, it is our determination that it is inciting riot or people to violence. Anything that goes through the mail, we must allow in.

The Court: Oh, yes, but if you felt that Jackson's comments to the press were creating internal difficulties, you could have censored that, couldn't you?

The Witness: It would have been impossible, sir, with the magnitude of the——

The Court: It would not have been administratively possible?

The Witness: Impossible, because the results of the interviews were in most all the publications that were coming in. They come in by the hundreds.

By Mr. Hannon:

Q. Now, what the message, if you will, that George Jackson had that was being published in the press and being sent into your institutions, please?

A. I can't say specifically. Generally, it was our opinion, after reviewing this, that the message was to the dissident type of inmate to not cooperate was the way to bring about change and to cooperate was to perpetuate the system **[118]** as he saw it; and it was destructive, in terms of management principles, a destructive message, in our opinion.

Q. What did the interviews, in your judgment, Mr. Procunier, do to the image of George Jackson? Do you have an opinion on that?

A. It magnified, in our opinion, a negative leadership role, influencing men throughout the department to adopt the same type of attitude.

Q. Now, at about the time that this was going on, did you sense or discern any change in the disciplin-

ary problems of the penal institutions in California with respect to inmate.

Q. Now, at about the time that this was going on, did you sense or discern any change in the disciplinary problems of the penal institutions in California with respect to inmates?

A. We felt very strongly that this was the case.

Q. Did you make a judgment, Mr. Procunier, as to what was the cause of the disciplinary problems that were now erupting?

A. Yes.

Q. What was the judgment?

A. The judgment was that the results of interviews with George Jackson and other inmates who had similar attitudes was a part of the increase in problems in the department.

The Court: I don't want to cut Mr. Hannon off, but I am sitting here trying to find out what you did about it. What are your rules now?

The Witness: We have changed it now. The interview policy with the media is almost identical with the Federal requirements. The only change that we made is this: We will **[119]** not allow an interview, a press interview or interview with the the media at their request by specific name and number. We haven't changed the accessibility of the institution and talking to inmates.

The Court: So, it is more or less like the Federal policy?

The Witness: Almost identical to the Federal policy, with a few modifications. We changed from the

open policy to what the Federals are doing now. We have some other changes, but they are minor.

By Mr. Hannon:

Q. The significant change is that the press is no longer allowed to interview prisoners, as such?

A. The significant change is that they still interview inmates. They interview or talk with them, or any way you want to put it, but they do not do it on their own initiative with specific inmates. I can expand on that, if you want me to, to make it clear.

Q. Please do.

A. For example, just recently, because of the interest in California in the death penalty, a reporter from one of the major newspapers in the State wanted to do a story on the death penalty and he wanted to talk to some men who had had the death penalty commuted to life. Prior to that, he would have come in with several names of inmates he wanted to talk to and **[120]** he would have talked to them. Now we had each warden and superintendent give us the names of four, five men who would talk to him; and we gave him the list and said: Who do you want to talk to.

The Court: In other words, you made sure he wasn't talking to a trouble-maker?

The Witness: I am sure they did. I didn't give them those instructions.

The Court: That was the general effort?

The Witness: The general effort is to minimize publicizing the trouble-makers.

The Court: Right.

The Witness: That is the general thrust of the thing.

The Court: Permitting interviews, otherwise?

The Witness: Yes.

The Court: The Federal policy is flat. You understand the Federal policy is no interviews. The Federal policy prohibits interviews without qualification.

The Witness: May I expand on this a little bit?

The Court: Yes, I want your help. You have had so much experience.

The Witness: What I heard them talking about earlier interviews or conversations, we don't distinguish between the two. If an accredited reporter wants to tour San Quentin or Folsom, or some place, and in the process of the tour, as he **[121]** is going around, he can hold conversations or interviews, or whatever he wants, with whatever inmates he wants to. He can't come in and say, I want to see Joe Doakes. We won't let him do that.

The Court: When he has that conversation, chat or interview, is it supervised or can he talk to him without any custodial or other person overhearing?

The Witness: That would depend on the circumstances. This decision would be made on an individual basis. If I were walking through the yard with a newspaperman and he wanted to talk to an inmate, it would depend on the inmate and the circumstances, whether I would step aside or not.

The Court: Right. On the other hand, if he is interested in a subject matter, such as the death penalty, you will permit some interviews there of se-

lected people, not chosen necessarily by him; is that correct?

The Witness: Not specifically. Not chosen by him under any circumstances, but we allow that type of conversation or interview.

The Court: That is unsupervised?

The Witness: Yes, can be or can't be. We make that decision on an individual basis.

The Court: A wholly individual basis?

The Witness: Yes.

The Court: Now I understand. Thank you.

[122] Mr. Hannon, you proceed the way you want.

By Mr. Hannon:

Q. That is comparable, is it not, Mr. Procunier, to the group discussion that we spoke of here today, that we heard about, that occurred at Lewisburg?

A. I don't know what occurred at Lewisburg.

Q. Well, let me change it and ask, essentially, is there any difference between the arrangement that you allow, where you have a group interviewed by the press, and the random selection system which we have at Lewisburg, where we will pick out at random 15 or 20 inmates and allow the member of the press to interview them? Are they essentially the same?

A. It is essentially the same as I heard the warden offered the reporter to do in the segregation area.

The Court: In other words, you don't permit individual interviews under any circumstances?

The Witness: No, we do. I understood that in the segregation area the reporter was allowed to——

The Court: To see a group.

The Witness: ——walk down through, past the cells, and have a conversation with the inmates.

Mr. Hannon: Yes, that is correct.

The Witness: Where we would allow them to interview them in a group.

[123] By Mr. Hannon:

Q. Now, would you allow a member of the news media to come in and talk to Manson, to interview Manson?

A. No.

Q. Or Sirhan Sirhan?

A. No. Not in—no.

Q. Now, did you make any judgment at all, Mr. Procunier, respecting what effect if any the press interview, such as was allowed with George Jackson, had upon the rehabilitative efforts of the institution with respect to that particular inmate?

A. Yes. This was one of the major bases for the decision. There were two or three different factors. One was the disturbance that it causes in other people; and secondly, it is our chore to do two things, we feel; and that is, to house people securely that are sent to us, and secondly, to do everything we can within our power and within our resources to prepare them for return to society.

The first thing that happens, we found out over the years, collectively, that before a man makes any kind of a change, there must be a change in his attitude. If a man is encouraged by increased notoriety and this encourages others to pursue this same thing, their

attitude is such that we can't deal with them in a constructive way. This was one of the major considerations in changing the policy.

Q. Did you conclude that this type of interview did [124] encourage other prisoners to follow the way of George Jackson?

A. Yes, we feel very strongly that that is true.

Q. That impairs the institution's efforts to rehabilitate these people?

A. And to deal with them in a constructive way, yes.

Q. Now, the George Jackson that we are speaking of was one. Were there others that you can call to mind that the press had an interest in interviewing?

A. Yes.

Q. Would you name a couple of them for me, please?

A. There was a man by the name of Drumgo and one by the name of Cluchette.

Q. Who are they?

A. They were the co-defendants in the same murder trial.

Q. The Soledad Brothers?

A. That is what they are euphemistically known as, yes.

Q. Now——

The Court: Your prohibition of interviews affects all of your work release and industrial work programs, and release programs, all of that, all the way through the system?

The Witness: Again, I want to emphasize, on an individual request basis. It doesn't prohibit that if the person were touring. It does on an individual request basis; it prohibits it with everyone.

The Court: No matter what their status is in the [125] correctional system?

The Witness: Right.

Mr. Hannon: May I have Your Honor's indulgence, please, sir.

I have no further questions of Mr. Procunier, Your Honor.

The Court: Are you going to have many? I know this gentleman wants to get away.

When does your plane go?

The Witness: 5:45. I have plenty of time, now that I am on the stand. I don't think they will want to talk to me that long.

The Court: No, they won't. I think at this time we had better break until 1.45. It is a convenient point and I am sure you will get off and get back on schedule with the other judges.

The Witness: I appreciate that, Your Honor.

The Court: 1:45, then. I have one brief arraignment at 1:45 and that is all. Then we will go ahead.

(Whereupon, at 12:30 p.m., the hearing was recessed, pursuant to reconvening at 1:45 p.m. of the same day.)

[126] *Afternoon Session*

(Whereupon, the hearing reconvened at 1:50 p.m.)

The Court: If you will return to the stand.

Whereupon—

RAYMOND K. PROCUNIER

resumed the witness stand and testified further as follows:

The Court: All right, Mr. Califano.

Cross-Examination

By Mr. Califano:

Q. Mr. Procunio—is that it?

A. No.

The Court: No, i-e-r.

By Mr. Califano:

Q. Mr. Procunier, you indicated that prior to the experience with George Jackson, you had a different policy than the one you have now at the prison in California; is that correct?

A. Yes.

Q. How long did you have that policy?

A. It had been in effect for years. I can't tell you exactly the time. It was the whole time I was the Director and prior to that.

Q. So at least from 1957?

The Court: Sixty-seven.

Mr. Califano: Sixty-seven, I am sorry.

[127] By Mr. Califano:

Q. Through some time after August of 1971?

A. Yes.

Q. Do you remember when you changed the policy?

A. The latter part, the last week in August or the first part of September, I think it was.

Q. And Jackson was killed in that month?

A. In August.

Q. Do you by any chance have the two policies, statements of these policies with you?

A. No, I haven't.

Q. Are they written down?

A. Yes.

Q. Was Jackson the most interviewed prisoner you had?

A. No.

Q. There were others who had more interviews over shorter periods of time?

A. No. You asked two questions.

Q. Right.

The Court: You have had some who were interviewed more on a longer period of time?

The Witness: Yes.

By Mr. Califano:

Q. Over a longer period. Jackson, you said, was interviewed 33 times between August of 1970 and June of 1971?

[128] A. Yes, at least.

Q. At least, all right.

You indicated in your direct testimony that that created an administrative burden of some kind.

A. Yes.

Q. What was that burden?

A. Well, we determined conservatively that one administrative burden is that when a man is in a lock-up status, to have him interviewed by the press or anyone else, it takes a half a man day for an interview.

Q. For a half hour interview?

A. Yes, or for an hour interview or for a 15-minute interview.

Q. When you had your interview policy, where were prisoners interviewed?

A. It depended upon the status of the inmate. If he were an inmate in a halfway house, outside the prison, it may be there. It may be on the street while he is on the job; or it may be, in a camp, it would be at the camp office or on the work crew. It would depend on the status of the inmate.

Q. You recognize that 33 interviews over a ten-month period is less than one interview per week. Did you have anyone interviewed more often than that in comparable periods of time?

A. No.

[129] Q. Who would be the next most interviewed prisoner, or what kind?

A. The next most interviewed, related to time, would be an inmate who was interviewed 66 times over a period of about 18 months, something like that.

Q. Did you have a letter policy vis-a-vis communication with the press in California?

A. I don't understand your question.

Q. Are prisoners permitted to write letters to members of the press?

A. Our policy—you are talking about mail policy, is that what you want to get to?

Q. Mail policy, that is correct.

A. Our mail policy in California varies among the institutions from the answer, no, to that question, to, yes, unrestricted. We deliberately do not have the same policy in each institution. We don't want Fol-

som to run like our narcotics hospital. Depending on the kind of inmate that the institution handles, the policy varies.

Q. What is your letter policy, your mail policy at its most liberal vis-a-vis correspondence with the press?

A. Well, it isn't only related to the press. The most liberal institution we have, they send letters on the same basis that you and I do.

Q. Back?

[130] A. They receive them on the same basis that you and I do.

Q. With a prisoner in a prison that would be comparable to a medium security prison in the Federal system, in a prison of that kind in your system in California, what would be the letter writing policy between an inmate and the press?

A. You will have to get specific by name of institution because I leave it up to the warden-superintendent; but, generally, I can answer your question. Going out it would be inspected and may or may not be read; and coming back, it would be inspected and may or may not be read, depending upon the status of the institution. We have no institutions that handle only medium men, the same as the Feds. Within one institution I want the freedom of the wardens so that they can have 100 per cent censorship with some inmates and no censorship with some inmates, depending upon the responsibilities they have demonstrated in their ability to handle mail problems.

Q. Was Jackson permitted to write letters freely?

A. What do you mean, freely?

Q. Was George Jackson permitted to write to reporters?

A. I don't understand what you mean by freely.

Q. Was he permitted to write letters to reporters without censorship?

A. No.

Q. Or to friends without censorship?

A. No.

[131] Q. So his letters were read by the prison authorities before they went out?

A. Yes. With the exception of mail to me or to an elected official in California, the Governor or the agency administrator, and at that time—we have changed it since that time, it has varied—we were allowing sealed letters to attorneys.

Q. Sealed letters to attorneys at that time?

A. Yes.

Q. At that time you had a policy—correct me if I am wrong—where you could have an unsupervised interview with a prisoner if you were a reporter, with no prison official present, in the sense of being present within earshot, but you could not, if you were a prisoner, write a letter that would not be censored or at least read for censorship purposes to a reporter; is that correct?

A. Correct. Under some circumstances.

Q. But in the case of Jackson, as an example?

A. Yes, I am sure that is true.

Q. Do you remember by any chance when Mr. Jackson's book was published?

A. About when it was, I do.

Q. January of 1971?

A. (Witness nods assent.)

Q. Or shortly before then. Do you think that book had **[132]** anything to do with his becoming a Big Wheel in your prison?

A. Yes.

Q. Have you ever read that book?

A. No.

Q. It is a book of his letters.

A. I am aware of what it is. I have had it reviewed to me. I have never read it.

Q. From prison.

In your present interview policy, as I understand, a reporter may walk around the prison with one of your wardens and interview inmates while he is walking around the prison; is that correct?

A. Yes, or with anyone else we designate, if we approve him.

Q. If you approve them. If you approve them, do you let them talk to them without supervision?

A. It depends. I stated, it depends on the circumstances. For clarification purposes, though, it is possible, certainly possible. It would be a—well, that is clear enough.

Q. Do you believe that George Jackson was the major cause—that the publicity which attended George Jackson, while he was a prisoner, is the major cause of the problems you have in the California prison system?

A. The major cause? I don't know that.

The Court: I imagine that crime is the principal **[133]** problem.

The Witness: The people we got in the prison are the principal problem.

Mr. Califano: Just one second.

The Court: What is in the Court's mind a bit here, of course, is a question that may have nothing to do with this hearing because the Court isn't sitting as a legislative body and has no responsibility for drawing regulations. I have tried to follow a lot of the reforms and progress that has been made in California, and I am somewhat aware of the responsibility of that prison system.

What you portray to me is a sort of flexible approach to this problem.

The Witness: Yes.

The Court: Where the individual warden is given judgment, depending on the nature of the problem at the moment, perhaps even the character of the particular newspaperman, the prisoner involved, the circumstances, the whole thing.

The Witness: May I comment here?

The Court: You may in a minute, after I put in focus my question a little more for you.

Here what I am confronted with is an absolute flat policy laid down from the highest authority that writes a total bar across all of the aspects of the Federal system, including work release, every other kind of furlough release, every other **[134]** kind of release.

I am wondering whether in your experience you feel that absolutes of that kind, as opposed to the flexible approach that you have taken in California, is

the best approach to the problem of press relations and corrections generally?

The Witness: I much prefer the flexible approach, however, the one rule that we have with no flexibility is the rule we are discussing about individual requests for interview; and this was put in after a great deal of agonizing because of the very thing you are talking about. The best way for prisons to run, in my opinion, is to allow the warden or the man in charge of each institution, who can better assess than any director or anyone else the conditions of his institution and the kinds of inmates or the condition of the inmate at the time, the type of person that wants to interview him, for what purpose, to make a subjective evaluation of the total thing. However, in order to correct the situation that was getting out of hand, in my opinion, after consulting with the wardens and my staff, time after time, to avoid putting in the very policy we have, because this disturbs me greatly, we had to go to this. Our relationship with the press has always been fine. I would prefer not to have this rule. But I have not been able, with the group of people I have to deal with in California—there are none better, as far as I am concerned, and that is probably biased—to arrive at a solution to control the **[135]** problem that we have been discussing here without that arbitrary rule.

Do you understand what I am getting at? This came after a great deal of agonizing because we tried to have modified versions of it and it wouldn't work.

The Court: I can see from your explanation why you need it in San Quentin, or something of that kind.

The Witness: Yes.

The Court: But do you not have facilities within your system that are minimum security?

The Witness: Yes.

The Court: Perhaps first offenders?

The Witness: Yes.

The Court: Non-violent.

The Witness: Yes.

The Court: That type of prisoner.

The Witness: Yes.

The Court: Why did you feel, because of the Jackson situation, which I understand, that that had to be imposed with respect to this other category of prisoner?

The Witness: My counsel suggested to me that----

The Court: You mean your attorney?

The Witness: Yes.

The Court: I want to be sure you are talking about a lawyer.

[136] The Witness: My attorney suggested to me —we were thinking along the same lines you are suggesting—that I had to make it apply to everyone or I would not be allowed the prerogative that you suggest here. That is the only reason I have it across the board.

The Court: In other words, as a correctional matter putting aside legal considerations, you would tend to want to make the non-interview thing selective also?

The Witness: Yes, sir.

The Court: And it is because of legal considerations that you put it across the board?

The Witness: Yes, sir.

Mr. Califano: You have asked my questions, the last part of it.

The Court: Is there anything further?

Mr. Hannon: I have no further questions to ask.

The Court: Thank you, sir.

Mr. Hannon: May he be excused, Your Honor?

The Court: Yes, certainly.

Mr. Hannon: Thank you very much.

The Witness: Thank you.

(Witness excused.)

Mr. Katz: Mr. Alldredge, please.

[Declaration of Service Omitted in Printing]

[Memorandum of Opinion of United States District Court for Northern District of California in Hillery, et al., v. Procunier, et al., No. C-71-2150 SW, filed August 16, 1973, which is printed as Appendix A of the Jurisdictional Statement filed on November 9, 1973, in Procunier et al. v. Hillery, et al., USSC No. 73-754, and which is now reported at 364 F.Supp. 196, omitted in printing]

Supreme Court of the United States
Order
Filed January 7, 1974
Procunier, et al. v. Hillery, et al.
U.S.S.C. No. 73-754

The motion of the appellees for leave to proceed *in forma pauperis* is granted. In this case probable jurisdiction is noted.

Supreme Court of the United States
Order
Filed January 21, 1974
Pell, et al. v. Procunier, et al.
U.S.S.C. No. 73-918

In this case probable jurisdiction is noted. The case is consolidated with No. 73-754 and a total of one hour is allotted for oral argument.

Supreme Court of the United States

No. 73-734

Raymond K. Procunier, Director, California Department of Corrections, et al.,

Appellants,

v.

Booker T. Hillery, Jr., et al.

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

January 7, 1974